

**RACING APPEALS
TRIBUNAL
NEW SOUTH WALES**

**TRIBUNAL MR D B ARMATI
ASSESSOR MR W ELLIS**

EX TEMPORE DECISION

MONDAY 16 MARCH 2020

APPELLANT ANTHONY BUTT

**AUSTRALIAN HARNESS RACING
RULE 163(1)(a)(iii)**

SEVERITY APPEAL

DECISION:

- 1. Appeal upheld**
- 2. Penalty of 20 days' suspension of licence imposed**
- 3. Appeal deposit refunded**

1. Licensed driver Mr Anthony Butt appeals against a decision of the stewards of 29 February 2020 to suspend his licence for a period of 28 days for a breach of Rule 163(1)(a)(iii).

2. That rule relevantly provides:

“A driver shall not cause or contribute to any interference.”

The stewards particularised the breach as follows:

“... that you, Anthony Butt, as the driver of Dr Susan NZ, which competed in race seven at Menangle on Saturday, 29 February 2020, did cause interference in that you have permitted your filly to shift down the track on approach to the first turn when positioned to the outside of Maajida driven by Greg Sugars, and as a result of Dr Susan moving inwards, Maajida has been crowded, tightened for room and forced to move inside and contact marker pegs, at which point it was checked and lost its rightful running.”

3. When confronted with that allegation by the stewards, Mr Butt immediately entered a plea of guilty. He has maintained that admission of the breach on this appeal. This is a severity appeal only.

4. The evidence has comprised the video images of the race, the transcript of the stewards' inquiry, the offence report and a stewards' report of race three at Newcastle on 21 February 2020. The chairman of stewards, Mr Adams, and the appellant gave evidence.

5. The admission of the breach and its maintenance on appeal reduces the number of matters which need to be considered.

6. The stewards approached the issue of penalty in accordance with their penalty guidelines. The relevant penalty guideline adopted for a 163(1)(a)(iii) breach was a starting point of a 28-day suspension because the facts available to them indicated “horse checked, tightened or jostled on the first turn or final 200 metres”, the relevance being from those guidelines “tightened on the first turn”.

7. The guidelines provide for certain increases and reductions. The stewards approached it in their usual fashion, having adopted a 28-day starting point of giving a 7-day reduction for a plea of guilty and a 7-day reduction for the driving record. That is because the guideline provides that 7 days is available for 150 drives and no more than two suspensions in the last 12 months under these rules. The fact is that in the season to that point he had had 169 drives. In the previous year, 369. And in the year before that, 602.

8. The penalty guidelines then provide that there be a mandatory doubling of penalty because they are in these terms:

“GROUP 1 EVENTS

All training and driving offences committed in a Group 1 event will result in a Penalty being no less than twice the value of a metropolitan level of penalty.”

9. To extract from that, this was a Group 1 event, it had prize money of \$200,000. The rule provides – not a discretion – a mandatory application of the guideline provision because it adopts the word “will”. That is not a discretionary word such as “may”. And it was a metropolitan race, so a metropolitan level of penalty was activated.

10. The stewards then, having started at 28 and given a reduction of 7 and a reduction of 7, came to 14, increased it, as they were required to do, with a double-up and arrived at 28.

11. The Tribunal has often stated that these are guidelines, not tramlines, and in its application of an appropriate penalty consideration, the Tribunal is obliged, having regard to the rules generally to consider them. But, as the Tribunal has said, it has regard to those guidelines because it is that which the stewards operate upon, it is that under which the drivers expect to be dealt with and it also provides a certain outcome against which many discretionary factors are balanced so that those to be the subject of the rules will know a likely outcome if they engage in certain conduct.

12. This Group 1 race was, to quote the appellant, one in which there was a burn at the start. The appellant started in barrier 9, two from the outside, and was driving Dr Susan NZ. To his inside was Maajida, barrier 5, driven by Mr Sugars. And inside that Stylish Memphis driven by Mr Purdon. It was expected that those three would start with the speed with which they did, in the appellant’s opinion, and he did so. It was his aim, he has stated, to get to the rails position.

13. He points out in his evidence that this major burn led to a racing time of 53.5, and on the other equivalent races on the night, the lead times were 58, 60 and 57. And, indeed, he points out that in the subsequent Derby race, for which those other ones had been qualifiers, it was run in a lead time of 55. And in the Consolation for the Miracle Mile race, they ran it in 57. A fair reflection, therefore, that these horses were travelling at considerable speed. Indeed, as Mr Butt pointed out in his evidence, he subsequently had to hand up to Mr Purdon’s drive, the favourite, something he didn’t wish to do, but because of the speed in which he engaged at the commencement of the race, it was necessary to do so. Therefore, the horses are travelling very quickly. The appellant is coming across and down. Mr Sugars is moving

down. Before the first turn the appellant and Mr Sugars all got the better of Mr Purdon's horse and were ahead of it.

14. The effect of that move down the track is one in which the appellant is noted on several occasions to look to his left to a position where he was able to observe Mr Sugars' horse and Mr Sugars' drive. As the turn was approached, the appellant and Mr Sugars still commenced to move down the track until Mr Sugars was able to reach a running line which had him just running in the correct position on the track outside the marker pegs on the track.

15. The position then became that the appellant, on his own evidence, was too slow to react to the position of Mr Sugars' horse. The appellant got it wrong by a couple of strides – his own evidence. The effect of getting it wrong was that he continued to come down and forced Mr Sugars to move inside the marker pegs to the extent that one was struck and one was brushed. The horses were still travelling at considerable speed. At the point of impact with the marker peg, Mr Sugars called out. Mr Butt explained to the stewards, consistent with the video images and the evidence to the stewards by Mr Sugars, that he immediately engaged in correction action.

16. The appellant has quite rightly, by his evidence to the stewards, his admission of the breach and his evidence to the Tribunal, been too slow to react and did get it wrong.

17. The effect of that wrongful driving was, in the opinion of the stewards at their inquiry, repeated by the Chairman of Stewards in evidence today, Mr Adams – and he chaired the stewards' panels on the night – that this was a high degree of carelessness. That was because Mr Butt was never clear, he was continually moving down and he engaged in no corrective action. All things were within his power. All things he should have done, because the position of Mr Sugars and his horse was obvious to the appellant as he came down, and in addition, the appellant was able to observe the marker pegs and should therefore, as the highly experienced driver that he is, have known that Mr Sugars was being moved down to those marker pegs and in all probability to go inside them. It is the stewards' position also that the corrective action took place after the incident, that was the forcing of Mr Sugars' wheel to strike the marker pegs.

18. The appellant having not sought to challenge his failures sought to lessen the gravity. He has done so in a number of ways.

19. He points out there was no contact wheel-to-wheel, there was no contact horse-to-horse. It is his evidence that it did not of itself create a danger. Of course, the contra to that is the potential for danger, as Mr Adams pointed out in his evidence, when a horse's legs or a sulky wheel comes into contact with a marker peg, that that can occasion a horse to

jump, to trip or for a fall to be occasioned. It is, therefore, that there is potential for danger and the Tribunal is satisfied that there were dangerous implications.

20. The appellant points out that the horse Maajida was not caused to race roughly or gallop. That is correct. But as the stewards point out, there was a loss of a rightful running line because Maajida was forced down inside the marker pegs. It is that the appellant corrected his drive – and there is no doubt about that – and shortly after the incident was well clear. However, as the stewards state, it is that that correction was made too late, that it was a correction that should have been apparent to such an experienced driver as the appellant.

21. The appellant points out that the effect of his drive was that no other runner in the field was affected by this particular incident. As to what might have been the impact later, or a different impact later, is conjecture and is not part of the case. The Tribunal is satisfied that the video images and the evidence available to it do support that submission and that piece of evidence of the appellant. Therefore, he said it had no bearing on the running of the race. That is a submission, a piece of evidence, which on the face of everything available to the Tribunal has merit.

22. The appellant also points out that there is to him a greater financial impact than there would be to many other drivers and the stewards failed to take that into account. As the stewards elicited from him in cross-examination here, he did not put those matters to the stewards when he was given the opportunity to address on penalty. He does so in evidence to the Tribunal and it is apparent at this time of the year there a number of Group 1 races, he points out that he has lost drives in Group 1 races last Saturday, the potential to lose them in Bathurst and the Western Australian Derby. He also points out that he is driving less now because he is driving in more major events, and that is consistent with the fact that he is a highly experienced and sought after driver.

23. The Tribunal is satisfied there will be a financial impact upon him that would be greater than a driver who only participates very occasionally. The Tribunal's opinion is there is a counterbalance to that submission and that is this: that a driver of this experience and standing, who is likely to lose greater sums of money from a loss of the privilege of a licence, carries with it, therefore, with that experience and with that knowledge, a greater obligation than would apply of others to ensure that breaches of the rules occasioning interference and the like do not take place. Nevertheless, there will be financial impact and the Tribunal accepts that.

24. He also points out in his evidence and submissions his cooperation with the stewards and to his early plea of guilty and the maintenance of that. The stewards gave him the standard benefit of 25 percent. The Tribunal is of the

opinion that that 25 percent the stewards considered to be appropriate is correct and the Tribunal itself considers that a 7-day reduction in its entirety for that plea is appropriate.

25. As to his record, the penalty guidelines provide reductions. The guidelines themselves indicate that there is to be the reduction which was outlined earlier, and his record supports such a reduction of 7 days. When some reprimands and other breaches are taken into account, that 7 days the stewards considered appropriate is also considered an appropriate reduction in its entirety by the Tribunal, without examining it in more detail.

26. In essence, it is the case for the appellant that he has been dealt with too harshly. In that regard, he says that the breach itself was at a lower end of the scale and did not have that high degree of carelessness which is alleged against him.

27. The appellant and also calls in aid a parity case, that is the Exhibit R4 case, Newcastle, 21 February 2020, race three, in which driver Bull was suspended for 14 days. Briefly, that indicates that the drive of Mr Bull was such as he came down the track and allowed his gelding to shift in at a time when he was not clear of another horse resulting in that horse being tightened and checked and then shifted in. The effect of that tightening, checking and shifting was to cause interference to a horse inside that other horse, which was then itself checked and broke gait and took no further effective part in the race. That driver, Mr Bull, had pleaded guilty and his driving record was also taken into account in determining penalty. It is submitted that the facts of that case indicate that it was more severe and yet only a 14-day penalty was imposed. There are, of course, a number of factors which lead to different penalties in different circumstances. The appellant in his grounds of appeal points out that the impact upon him financially would equate to possibly some \$10,000 against that of Mr Bull of some \$86 in lost percentages as a potential. It is also the case for the appellant that his case was far less serious than that of Bull.

28. Those then are the critical matters which have been advanced in this case. In essence, the Tribunal is asked to consider by the respondent, the regulator, to maintain the 28-day suspension that the stewards considered appropriate having regard to the facts before them, their assessment of those facts, their aligning of those facts with gravity and then considering the application of the penalty guidelines. The appellant, on the other hand, invites a lesser penalty and possibly a lesser suspension, perhaps combined with a monetary penalty, on the basis that it was not a high degree of carelessness case.

29. The Tribunal proposes to approach the issue of penalty, based upon all of those facts and circumstances, in this fashion: recognising the importance of the penalty guidelines, but adopting that which the Tribunal

has expressed on many occasions, that if a starting point is provided for, then it is that there be a standard run-of-the-mill case, as it were, to which that starting point must be applied.

30. Here it was open to the stewards to in fact increase the starting penalty by reason of the high degree of carelessness they assessed, but they did not do so. Therefore, they started at 28 rather than something more.

31. The appellant satisfies the Tribunal that the starting point of 28 days can be varied in his favour. Weight must be given to the expertise of the stewards and their assessment having regard to the considerable number of cases with which they deal in assessing gravity of penalty. Recognising the appellant's efforts and the evidence he has given, to lessen the gravity of it, there still must be weight given to that expertise. Whilst it may be a case of being too slow to react and getting it wrong by a couple of strides, there nevertheless was an interference for which a penalty guideline range applies. The Tribunal recognising that the degrees of carelessness might have led to greater harm because there was a contact with the marker pegs, but noting that the higher penalties available to them were not adopted, has formed an opinion that all of these facts here, without going through them all again, enable a slightly lesser starting point.

32. The Tribunal wishes to avoid mere mathematical calculations, but for ease of determination of an appropriate conclusion, has adopted a starting point of 24 days.

33. Reduced from that, consistent with the findings made, are 7 days for the plea and 7 days for the record. That is 14 days. 14 days from 24 leaves 10.

34. The Tribunal considers that a 10-day suspension is appropriate for the conduct in which he engaged. However, there must be a multiplication against that 10-day starting period by reason of the mandatory nature of the guideline. The Tribunal considers that that guideline providing a mandatory increase must be recognised by it as a reflection of the importance to all of the industry, without dissecting it, of breaches that occur in Group 1 races. The reason for that is obvious and is an appropriate thing. Therefore, there is that mandatory doubling and that means 10 multiplied by two is 20.

35. The Tribunal then reflects upon whether a 20-day suspension is appropriate. The Tribunal does not consider that some lesser period coupled with a monetary penalty is appropriate. The Tribunal considers that having regard to all of the facts before it, a 20-day suspension is an appropriate order in respect of this matter.

36. The severity appeal is upheld.

37. The Tribunal imposes a period of suspension of 20 days which, subject to correction, will then commence at midnight on 7 March, which was the date upon which the 9-day period that the stewards had considered commenced.

38. The application not being opposed the Tribunal orders the appeal deposit refunded.
