RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI
ASSESSOR MR W ELLIS

EX TEMPORE DECISION

THURSDAY 26 APRIL 2018

APPELLANT DAVID LINDON

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

SEVERITY APPEAL

DECISIONS: 1. Appeal dismissed
2. Suspension of licence for 35 days imposed
3. Appeal deposit forfeited

1. Licensed driver Mr Lindon appeals against a decision on the stewards to impose upon him a period of suspension of his licence to drive of 35 days, imposed on 6 March 2018. The charge alleged against him was under Rule 163(1) as follows:

> "A driver shall not –
>
> (a) cause or contribute to any
>
> (iii) interference".

The particulars being:

> "as the driver of Semi Sensation here at the Newcastle Paceway on 6 March 2018 in Race 7 have when approaching the home straight on the final occasion shifted your runner wider when not sufficiently clear of Final River, which was driven by Mr Atkins, and as a result that runner was checked and broke stride, which in turn checked the running of Topsky, and severely checked Victory Valley, causing its driver to be dislodged from the sulky."

2. When confronted with that allegation, the appellant pleaded guilty. On lodging his appeal to this Tribunal, he sought to have the matter dealt with on the basis that he had not breached the rule. In the course of the few days prior to the commencement of this hearing, that plea was changed to an admission of the breach. This, therefore, is a severity appeal only and the need to examine the drive in detail diminishes and is, as an examination, limited to the issues raised in the evidence and submissions.

3. The evidence has comprised the transcript and race vision available to the stewards, together with his driving history in recent times, about which evidence was given of a mark-up of that document, to which the Tribunal will return, together with the stewards' reports of the various races to which that mark-up table applies, and a search in respect of one of the horses involved in the race, Final River, together with a press article about the appellant and his offence report. In addition, Mr Adams, the Chief Steward, who was one of the panel of stewards on the night, gave oral evidence.

4. The relevant facts, as has been expressed, are not set out in great detail. The reason for that is that there are but a few matters which are canvassed of relevance.

5. Suffice it to say that in the race the appellant admits to the stewards and admits to this Tribunal that he caused the interference alleged against him by moving out as they entered the home straight. At that time a horse driven by a Mr Reese was leading and appears to have moved out what is an agreed distance of about three-quarters of a sulky. The appellant says,

consistent with Rule 163(3), he proceeded to follow Mr Atkins' drive up the track. Rule 163(3) says:

> "A driver shall trail with the head of the driver's horse behind the seat of the sulky being trailed."

6. The effect of that move up was to cause the circumstances described in the particulars. Final River, driven by Mr Atkins, was caused to be, as Mr Atkins described it, pushed wider on the track. There was contact with the nearside front leg, he said, and the horse went rough, locked wheels with the sulky upon which Mr Ponsonby was driving Topsky, which itself then caused Mr Carmody, who was driving Victory Valley, to be dislodged on the home turn and thrown to the track. Each of those three horses retired from the race.

7. If it is accepted that Mr Reese moved up the track, does 163 exculpate Mr Lindon from his subsequent interference? In the Tribunal's opinion, no. As Mr Adams said in his evidence, that did not give, in the Tribunal's terms, a right to cause interference. And it is the way the Tribunal considers the rule must be read. In other words, Rule 163 tells a driver where, provided all other rules are complied with, he should place the head of his horse. It does no more.

8. It is common ground in these proceedings that the appellant, having passed the candy pole at this track at about the 700 metre mark, in accordance with a local rule, which is not in evidence, or a local provision which is not in evidence, made pursuant to Rule 164, was entitled to shift out. However, 164 is, of course, itself to be read in conjunction with all of the other rules about interference, impeding, hindering, jostling, crossing and the like. It is again not a carte blanche – the Tribunal's terms – to do anything which otherwise breaches other rules.

9. There is no doubt that as Mr Lindon shifted up following the trail of Mr Reese that it was open to Mr Atkins on Final River to move up, or shift up, as well, as it was open to those horses coming up behind Final River, driven by Mr Ponsonby and Mr Carmody to also shift up. But there is no rule that obliges Mr Atkins to do so. There is no rule that says Mr Lindon can shift up as he did, regardless of his entitlement to do so, on the basis that everyone else must also shift up. It does happen, it appears on the evidence, in races, but there was no obligation on Mr Atkins to do so.

10. Accordingly, the shift up, which Mr Lindon engaged in, occasioned the interference alleged against him and which he quite properly admits. As he said to the stewards when confronted with the allegation: "my defence is that the horse I was following did shift off, and did shift off on the turn, did shift up the straight." Later: "There was not sufficient room for my horse to travel between horses." That is the gravamen of the matter.

11. The issue then is what penalty should be imposed. The penalty guidelines provide, for a breach such as this, a 35-day commencement. That is in these terms: “Horse checked causing fall or driver dislodged”.
12. Some points. Firstly, it says “horse checked”, it does not say “horses checked”. But it does say “causing driver dislodged”. It does not say “drivers”. Here, three horses were checked, one driver was dislodged. There are lesser offences for interference. Simply the fact the horse was checked, it might be 21 days. If it happens on the first turn, with other circumstances, 28 days. If, however, a horse broke, as happened here, there is a starting point of 28 days. If something happened on the first turn, there is also a 35-day starting point. They do not need to be examined.

13. As has been submitted on behalf of Mr Lindon, the rule already makes provision for the fact that a heavier penalty starting point is appropriate when a driver is dislodged after the horse is checked. Therefore, a simple interference would attract a lesser starting point. Therefore, to simply increase the starting point because there was a fall is not appropriate. There is, however, within the rules, an accelerated penalty available in these terms: “A premium of up to 21 days may be applied for cases where a driver is found to have displayed a high degree of carelessness.” The Tribunal is invited to impose that provision. It is to be noted that the stewards in general terms, to quote Mr Adams, took into account the total effect of the shift and the likelihood of the impact of the move by increasing that 35-day starting point to 42.

14. Is the degree of carelessness so high that it is appropriate to consider either that seven-day increase or a 21-day increase? In that regard, it is necessary to look to the case for the appellant.

15. In essence, blame is attributed to Mr Reese by reason of his failure to comply with, it is submitted, a number of rules: shifting ground and impeding, hindering, causing others to cover greater ground, hindering passage, interference and recklessness. Firstly, Mr Reese did not give evidence to the stewards, and he has not given evidence here. He has not been the subject, it appears on the evidence, of any alleged breach of the rules by the stewards. He is not on trial here. The effect of the submission, however, is that because Mr Reese acted in the way he did, there is an external factor which can be taken into account by the Tribunal in lessening the gravity of the conduct of the appellant.

16. As it is accepted that the drive of Mr Reese occasioned a three-quarter move up the track and that the appellant followed that move up the track because he could not go on the inside, insufficient room was available, and he did so in accordance with Rule 163, is there some lessening of his culpability? To some extent there is. But, of course, it is in the context that it does not exculpate him from the remainder of his failures.

17. It is also said that the horse Final River has a degree of intractability about it. The stewards' inquiry did not adduce evidence to the effect that Final River was so intractable that it would have broken regardless of anything that the appellant did, which seems to the Tribunal to be the relevance of the tractability or otherwise of that horse. Its performance record is in evidence and it has been checked and broken, it has tired, it has contacted the sulky and done so on more than one occasion, and it has been the subject of being sent back for trials and the like. But that document does not establish that the horse is so intractable that it can exculpate the appellant from his responsibilities.

18. The appellant did not give evidence before the Tribunal, but his evidence to the stewards, which covers the issue, was the fact that essentially he was following the shift that Mr Reese performed. That seems to the Tribunal to be the remaining factor that could be used in his favour. As has been said, the Tribunal does not find favour with the suggestion that Mr Atkins was obliged himself to move up to give room to the appellant to engage in the drive that he did.

19. Having regard to those matters, and just briefly touching upon the Tribunal's attitude to the guidelines being that and not tramlines, it proposes to use those guidelines in this matter because it provides certainly, as has been expressed on so many occasions, to all who have to consider these matters.

20.The Tribunal has determined that the starting point of 35 days is inadequate to reflect the conduct in which the appellant engaged. It is of the opinion, consistent with that which the Stewards found to be appropriate, that a starting point of 42 days is appropriate, and it does that having regard to what it considers to be the degree of carelessness. It does not do so by reason of the effect of that carelessness. As has been expressed, that fall, the dislodging, the checking of the other two horses was covered by the increased starting point in those guidelines to start with.

21. What discounts should be given to him? There are strong subjective matters of driving of 42 years, that he has not come under adverse notice in respect of this rule. That, importantly, he engages in charitable work for the Charlie Teo Foundation, raising money for a most commendable cause, and does so of his own volition. He cannot, of course, use that particular subjective factor on every occasion on which he comes before the stewards or the Tribunal, but on this occasion he is entitled to the benefit of it and he shall receive it.

22. As to his admission of the breach, or his plea of guilty, he admitted readily to the stewards and cooperated with them. He has admitted the breach such that this proceeding is a severity appeal. Having regard to the

time before the commencement of this hearing, the Tribunal has determined – and there has been no suggestion of the contrary – that he will not lose the discount available to him for that breach.

23. As to his past record, the Chairman of Stewards has, as has been said, put in evidence a table which does not indicate any great comfort for the appellant. The difficulty with that evidence is that there is no comparison to other drivers, whether they be professional drivers or, as is the case here, a hobby driver. The reason for that is this: that in his last 105 drives, which goes back to 2011, he has had eight suspensions and six reprimands. The suspensions alone equate to 1 in every 13.125 drives. And when the reprimands are added into it – that is, those 14 matters in 105 – the figures, which the Tribunal has not checked, are that it is once in every seven and a half drives that he has been the subject of suspension action. In the absence of any other evidence, that seems to the Tribunal to be a singularly unhelpful factor when it comes to any further reductions to which he might be entitled. Those then are the key matters.

24. What then should be the discount given to that 42 days? In the circumstances, there is no discount for a good record. There is, in respect of the admission of the breach and his charitable work, a discount. The Tribunal comes to the opinion that that should total the seven days. The Tribunal comes to the same conclusion as the stewards did that a period of suspension of his licence of 35 days is the appropriate penalty for the conduct in which he engaged.

25. Accordingly, the appeal against severity is dismissed.

26. The issue of the starting point of that matter is complicated by the fact that he was suspended on 6 March and that was stayed on 16 March and he therefore served 10 days of that 35 days. The complication is that the Tribunal has yet to deal with a second matter, which it will deal with immediately after this matter, which involved a 28-day suspension from 5 April, which has an overlapping with this matter. Accordingly, the commencement date of this suspension shall be determined once the other matter has been finalised.

27. I order the appeal deposited forfeited.

Appeal for breach on 5 April 2018 interposed

28. I note now, having relisted the appeal in relation to the matter of 6 March, in the circumstances, as the Tribunal indicated earlier, the period of suspension was imposed on 6 March and lifted by a stay on 16 March. That appears to the Tribunal that a period of 10 days was served, which leaves a balance of 25 days to be served, which will commence tomorrow, 27 April, and the parties can calculate the concluding date.
