RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI
ASSESSOR MR W ELLIS

EX TEMPORE DECISION

MONDAY 6 JULY 2020

APPELLANT COLIN MCDOWELL

AUSTRALIAN HARNESS RACING RULE 156(2) X 2

DECISION

1. Appeals dismissed
2. Fines of $200 imposed for each breach
3 Appeal deposits forfeited

1. Licensed driver Colin McDowell appeals against two decisions of the stewards of Harness Racing to impose upon him, in each matter, a fine of $200 for a breach of one of the whip rules.

2. The rule in question is 156(2). The stewards set that out as per the rules in the following terms:

> "A driver shall only apply the whip in a flicking motion whilst holding a rein in each hand with the tip of the whip pointed forward in an action which does not engage the shoulder."

3. The first of the breaches is said to have taken place at Menangle on 11 May 2020, and the stewards particularised that breach as follows:

> "That you, Colin McDowell, the driver of Left Tennant, engaged in race 8 at the Menangle club on 11 May 2020, did apply your whip to Left Tennant over the final 200 metres of the event in an action which was considered by the stewards to have engaged your shoulder and not to be a flicking motion."

4. The particulars of the second breach said to have taken place at Menangle on 5 June 2020 are in terms:

> "That you, Colin McDowell, as the driver of Left Tennant, which competed in race 2 at Menangle on Friday, 5 June 2020, did apply your whip in the home straight in more than a flicking motion and did engage the shoulder."

5. At both of the inquiries the appellant pleaded not guilty and has maintained that he did not breach the rule on either occasion before the Tribunal.

6. The evidence has comprised the transcript and videos of the subject races and inquiries as well as films from a series of races in which drivers McElhinney, Hart, Cain, Manzelmann and Barnes each drove the subject horse between the period of 5 May 2020 and 12 May 2018, and also included within that period other drives by the appellant of the same horse.

7. In evidence is an industry notice of 29 August 2018, published to the industry in respect of Rule 156(2) as it was introduced and operative from that period. That notice carried with it a number of videos of drives in which it is said the whip has been applied within the rules. These were played to the Tribunal.

8. In addition, the appellant has put in a video of the subject horse taken from various angles, his statement to the Tribunal and correspondence between his solicitor, Mr Hammond, and Mr Adams, Chief Steward, in

respect of exemptions to the subject rule for the subject horse. In addition, there is the race record of the subject horse. Mr Adams, the Chairman of Stewards, and Mr Bentley, who chaired the meeting on 11 May – Mr Adams having done it on 5 June – have given evidence, as has the appellant.

9. The issue to be decided is a narrow one in respect of each event. However, the matters canvassed in the case have ranged over a series of matters.

10. There is no doubt that the horse Left Tennant is big. It is probably the biggest horse racing in Australia, but certainly in New South Wales, for harness racing purposes. It is possibly – although it is uncertain – 18.4 or 18.3 hands, and, in any event, if it is not precisely that measurement, it is much bigger than the standard harness racing horse, which is approximately 15.1 hands. There is no doubt that, therefore, the capacity to drive this horse requires greater skills than that of a lesser horse, and in particular, in respect of the application of the whip and, in its application, compliance with the rules.

11. It must be said at the outset that there is no doubt the whip rules have been introduced and refined – and, indeed, on the evidence are to be refined in New South Wales again in the near future – to address concerns about welfare of the horse. Those concerns are within the industry itself and, critically, external to the industry and they are not unique to this industry, they are very much a factor in the thoroughbred world.

12. If it is the intention of the rule-makers to eliminate all manner of concern of all people who may express a belief in respect of a whip and a horse, then they must write the rules accordingly. This appellant is entitled to have his appeals determined on the rules as they are written and as they are to be purposively interpreted on the facts that are to be decided in this case. It is not for this Tribunal to make a decision that is based purely upon aspects of welfare of the horse. If the rule has not been written to capture the conduct in which the appellant engaged, then of course he is entitled to have the charges dismissed.

13. On the other hand drivers have to comply with the rule and this one has no exemption for the application of the whip to a very large horse or for other circumstances such as a very short driver etc.

14. That issue arises because there are certain words and expressions in the rule that need to be considered and some of which are in issue. Firstly, there has to be an application of the whip. Secondly, that application has to be in a flicking motion. That flicking motion may only be engaged in if the driver holds the rein in each hand and at a time when the tip of the whip is pointed in a forward action. All of those matters must be engaged, but not the shoulder.

15. In this matter, there is no issue about the test imposed on a driver of whilst holding a rein in each hand, nor in respect of the expression “with the tip of the whip pointed forward”. The matters in issue are application of the whip in a flicking motion and an action which does not engage the shoulder. Simply put, that last matter does not have to be decided. It is the admission of the appellant in his evidence that in each race he engaged his shoulder.

16. Regardless of that, there is the evidence of the stewards chairing each of the two meetings – Mr Adams for the latter; Mr Bentley for the former – that the appellant engaged his shoulder. So whether it was fair to rely upon the appellant’s direct admission in evidence to that effect or not, there is the unchallenged evidence of the stewards that he did so.

17. That leaves for consideration the expression “apply the whip” and the expression “in a flicking motion”.

18. The evidence establishes that each of the other drivers that have been named and the videos seen– and it is noted that the driver Barnes engaged in a race on 12 May 2018 before Rule 156(2), as it is now worded, was in the rulebook- used the whip in various ways which do not take this matter forward.

19. Firstly, in some of the races the horse was obviously not going to be competitive at the end and the drivers simply did not use the whip in a fashion which was necessary to ensure an appropriate vigour to try and run a place. That is not to say they were not driving with the intent of obtaining the best possible placing as the rules require, but that it was apparent that there was no real benefit in using the whip on Left Tennant.

20. In other cases, it is apparent that the whip was used but was not used in any material fashion. In another case, it is apparent that the whip was used, the horse was driven forward and in some cases won the race and in others came second.

21. In each of those matters it is the evidence of Mr Adams that the whip rule was not breached. That conclusion is open to be drawn and that evidence is accepted. It is apparent also that other drivers have been able to drive this horse without breaching the subject rule.

22. There was challenge to Mr Adams that in respect of a number of those drives that in fact the drivers were striking the horse below the rump. That does not have to be decided. The reason for that is that the Tribunal has to determine what was in the mind of the appellant and what was the fact in these two races. The reason for that is that the appellant has not directly linked in his evidence his observations of the drives of those other drivers

and the fashion in which they applied the whip such that it caused him to apply the whip in the fashion in which he is observed to have done so here.

23. It might also be noted that in driving this horse on two prior occasions the appellant has breached the whip rule. In those matters he has been dealt with by the stewards.

24. It is quite apparent that the appellant has been deeply concerned by his capacity as a driver of this extraordinarily large horse to engage the whip in accordance with the rule. He has gone to extraordinary lengths to attempt to achieve some measure of protection and satisfaction as to the correctness of his conduct.

25. He has asked many of the stewards if they would come and sit in the gig and see what it is like to hold the whip and attempt to use it in respect of such a large horse. In that respect, it is quite obvious that a driver of ordinary stature – and by that I mean the expected harness racing driver stature – that in striking this horse on the rump, something more than the normal driving action is required. It is apparent that to sit normally in the gig to effect a whip action that is not in breach of the rule requires some practice.

26. The appellant has, through his solicitor, set out to and obtained indications from the Chief Steward in the correspondence in evidence that certain actions in which he engages are not considered to be in breach of the rules. But none of those engage the two issues in question here, namely, the application of the whip and in a flicking motion.

27. The appellant has, as part of his attempts to ameliorate the problem, done at least two things. The first of which is between the first and second race he took out and used a shorter whip. How much precisely short is not in evidence; it does not matter. That was designed to attempt to ensure that the whip did not get caught in the horse's tail.

28. The second thing he has done is to introduce a driving style he calls a windmill motion. As a result of him engaging that windmill motion some time ago, the Chairman of Stewards, Mr Adams, spoke to him and suggested to him in a formal fashion that he should use caution in respect of that action. That action involves the appellant, as it were – and this is not meant to be other than a cursory description – waving his arms around, left arm and right arm in unison, most of the time, raising them up above his head and winding them around. As required by the rules, the reins are in each hand.

29. He says that the effect of that action is that he moves the reins across the rump of the horse and is able to cause the horse to respond to those actions and not to require the the application of the whip. It is to be borne in mind, as consistent with the requirement of the rule, that at that point, and

on the evidence, in each of the two races he had the whip in his right hand and it was pointing forward.

30. The use of a windmilling action without the touching of the horse or the gig by a whip is not an application of the whip. There must be a purposive meaning to this rule. The Tribunal is of the opinion that the word “apply” in the expression “apply the whip” requires that there be something actually done with the whip in respect of the horse and/or the gig.

31. Striking of the gig is a time-honoured method of making a noise to encourage a horse to go forward. It is suggested in the evidence here by the appellant that because of the make-up of the gigs today that such an action does not produce a noise of any sufficient measure. That evidence is insufficient to indicate that striking of the gig is not used by drivers for the purposes of the application of the whip, nor in respect of whether in fact it occurred here or not.

32. The issue, however, of the appellant’s windmilling motion is not the end of the matter. The two Chairmans of Stewards have each given evidence that the appellant did not engage in a flicking motion. Their evidence is that the windmill actions did not comprise a flicking motion. There is then the video evidence of each of the two races.

33. The conclusion the Tribunal reaches is that it does not have to decide whether the pure use of a windmill action is an application of the whip not in a flicking motion. The reason for that is this, that in respect of each of the particulars it is part only of the race in which the use of the whip is in question. The stewards fairly concede that, relevantly, in one of the races at the 600-metre mark the appellant quite properly used his whip in accordance with the rule.

34. The question is whether there was a flicking motion and the application of the whip. The answer to that is not only the combination of the evidence of the two Chairmans of Stewards in the two races, but their observations of the video, supported by the conclusion of the Tribunal, aided by the Assessor Mr Ellis, that regardless of the windmilling motion, at times prior to the commencement of that obvious windmilling motion that the appellant has attempted to strike the horse and/or the gig with the whip and, indeed, vigorously so and repeatedly so.

35. Each of those occasions involved an application of the whip. The evidence is equivocal as to the contact with the gig or the horse, including its tail, on 11 May because that question was not asked and that specific evidence was not given before the stewards and it is, at its highest, not recalled by the appellant in his oral evidence today. But the Tribunal is satisfied from its observations of the video of that race that indeed the contact was being made by the whip to the horse.

36. As to the second race, there are again the observations of the stewards, the same observation by the Tribunal, but also the evidence that was given in the hearing. It is in the context that the appellant said:

> "I am not hitting him with that stick." But later, when asked this question:
>
> "Chairman: So the whip would be coming into contact with a point of the horse and/or the shaft. Would you agree with that?
>
> Appellant: Yes, but – probably but it's not intentional. It was more intentional to hit him with that rein – get that rein across his bum."
>
> And later: "Yes. Gets in the way. Gets caught in his tail."
>
> And later: "got caught because I'm missing him. I'm getting it caught in the tail. You watch a couple of strikes down there."

37. Those three points make the evidence of the application of the whip established.

38. Then there is the fact that it is not, as has just been determined, prior to the windmilling actions, a flicking motion. As said, it does not have to be determined whether during the windmill motion it was a flicking motion or not.

39. That then deals with the submissions about application; it deals with the aspects of actions.

40. That then leaves whether or not the final submission for the appellant for mens rea has to be established in respect of the matters because any contact was accidental. That is a matter on which the rule is directed towards an intentional application of the whip. It is an intentional application to come into use by making, as described, a contact.

41. The facts of the case are such that the actions which the Tribunal has based its decision upon do not require a further consideration of whether the requisite intent, or mens rea, has been established, because it is quite apparent to the Tribunal from its observations of the video that what was intended by the appellant was the application of the whip. The fact that any contact may have been accidental is not the test. The applicable intent is directed to the use, not the belief in the outcome.

42. In the circumstances, the stewards satisfy the Tribunal that each of the ingredients of 156(2) have been found established as particularised in each matter.

43. The appeals against the adverse finding of the breaches of rule are dismissed.

SUBMISSIONS MADE IN RELATION TO PENALTY

44. On the issue of penalty the stewards invite the Tribunal to give consideration to the first matter of 11 May involving a penalty of $200 and the second of 5 June of $400.

45. That arises because of the terminology of the penalty guidelines. A dissertation on those is not required. They are written on the basis of a first offence for $200 and a second offence of reoffending within 60 drives or a period of 60 days of that first offence is $400.

46. In relation to these matters, the second matter is obviously within the 60 days and 60 drives issue but the variation is that there had been an appeal in respect of the first matter at the time the stewards dealt with the second matter and they imposed a fine for the second of $200 rather than a $400 fine.

47. For the appellant it is submitted that in each matter no conviction should be recorded.

48. The Tribunal reflected at some length in its decision on the efforts of the appellant to remedy the difficulties he has with the subject horse and the Tribunal's understanding of it.

49. The appellant's record is one of many years' standing. He is a well-experienced and senior driver of 38 seasons and drives reasonably frequently in each of those, something like 100 a year on average. He has had a good number of winners and is, for that reason, a senior A Grade driver.

50. The problem for the appellant in respect of this matter is not his driving generally nor his efforts to remedy the difficulties he has, but the fact that these are his third and fourth matters in respect of the whip rule in more recent times, the first of which involved the subject horse some time ago and the other of which involved another horse.

51. The Tribunal puts that in this context, that it is in fact that since May 1999 – and his record prior to that is not known – he has breached the whip rule on 28 other occasions. That has to be put in the context of all drivers, and it is apparent to the Tribunal from its observation of these types of offence reports over the years, that whip rule breaches occur with considerable frequency.

52. The respondent puts in issue the welfare matters, the aspects of the industry having to maintain a strong stance in respect of a strong whip rule because of the attacks upon the industry on the basis of the welfare of the horse. The Tribunal accepts that is the position of the regulator. The appellant does not suggest otherwise. The position is that the stewards must take, and they must be supported by the Tribunal, in respect of matters of welfare, very strongly, and the Tribunal proposes to continue to do so.

53. The subjective facts here other than those that have been referred to do require a return to the efforts being made by the appellant and, indeed, they were even engaged upon between the breach of 11 May and then the subsequent breach of 5 June. He has been attempting to find a solution. The problem, however, is, as the Tribunal has reflected, that this is not his first breach in recent times and nor in respect of the subject horse.

54. In those circumstances, despite his efforts, the Tribunal is not of the opinion that the appropriate message to be given because of the welfare considerations is such that it is open to open in either matter to proceed on the basis of there being no conviction. Those same considerations and that history bring the Tribunal to conclude that any non-penalty, e.g. a reprimand or the like, would also not be appropriate.

55. The Tribunal, however, does not proceed to the second-tier-type offence matters for the 5 June offence or, strictly if they were to be dealt with in the order in which the stewards dealt with them, the 11 May offence by reason of the imposition of the penalty on a second offence basis. The extent to which the subjectives are advanced are that in each matter the Tribunal will impose a monetary penalty of $200.

56. That means the penalty appeal, in each matter it is to be dismissed.

57. The Tribunal imposes a monetary penalty of $200 in each matter.

APPEAL DEPOSIT

58. The final determination is the appeal deposit.

59. The appellant has not been successful in respect of either breach of the rule nor the penalties imposed, makes no application and accordingly the appeal deposits are forfeited.
