RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI
ASSESSOR MR W ELLIS

EX TEMPORE DECISION

WEDNESDAY 15 SEPTEMBER 2021

APPELLANT JACK CALLAGHAN

RESPONDENT HARNESS RACING NSW

AUSTRALIAN HARNESS RACING RULE 161(1)(z)

DECISION:

1. **Appeal upheld**
2. **Appeal deposit refunded**
3. **Application for costs by appellant refused**

1. The appellant appeals against the decision of the stewards of 25 May 2021 to impose upon him a period of suspension of his licence to drive for a period of 21 days.

2. The particulars of the charge were :

> "Rule 161(1)(z). A driver shall not (z) fail to fully drive his or her horse out to the end of the race."
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> The particulars were as follows:
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> "… Race 3 at Penrith Paceway on Thursday, 29 April 2021, where you were the driver of The General, in the home straight on the final occasion, in particular over the final 50 metres, you have failed to drive The General out to the end of the race."

2. The appellant pleaded not guilty before the stewards and has maintained on appeal that he did not breach the rule.

3. The evidence has comprised the transcript of the two days of the stewards' inquiry and the DVD of the race. In addition, witnesses Wally Mann, Jim Douglass and Darren McCall have given evidence. Neither a steward nor the appellant have given evidence on appeal.

4. The gravamen of this case is whether the appellant drove his horse out in the last 50 metres. It is the case for the stewards that he did not, that he stopped driving. It is the appellant's case that for a number of reasons he did not stop driving.

5. The witnesses called for the appellant have set out to advance a number of issues in their statements which are not matters for this Tribunal to be troubled by. They relate to conflicts between the whip rule and the driving-out rule, and matters involving whether or not this appellant should have faced this charge or not. The Tribunal has declined to take any of that evidence in and it was rejected from the statements.

6. The Tribunal's function is to determine whether the stewards satisfy the Tribunal on the balance of probabilities to the Briginshaw standard whether the appellant has breached the rule.

7. The Tribunal is assisted in coming to its determination on sitting with Assessor Mr Bill Ellis, and the Tribunal has consulted with Mr Ellis in respect of his opinions. There are the opinions of the Assessor and the expressed opinions of the stewards, the appellant as well as those of the three witnesses called.

8. Firstly, there is a whip rule which relevant to these proceedings, says that the whip shall not be applied if the horse cannot maintain or improve its position by use of a whip. Secondly there is the subject rule, which requires a driver to drive the horse out to the end of the race.

9. The test here requires a consideration of whether the respondent satisfies the Tribunal that the appellant was blameworthy in his drive. Issues which often arise of a split-second decision do not arise here, it was a considered decision over, effectively, the home straight and in particular some 50 metres over which there was a period of time. It is not a split-second decision. It is not an exigencies of the race type of case either.

10. The Tribunal must assess the appellant as an experienced driver of some three years, as was said in the inquiry, some 1200-odd drives up to the time of the inquiry. He cannot, therefore, despite his apparent young age, be protected from any suggestion that by reason of inexperience his actions might be found not to be blameworthy.

11. To put the finish in context, it is that the horse that won the race beat the appellant's horse by a head. The evidence is that in the course of the race – and the vision shows it – the appellant applied the whip on a considerable number of occasions, and there is no issue taken with that part of his actions. When the horses entered the home straight on the last occasion, the appellant was leading. As the horses came down the home straight, the winning horse overtook the appellant's horse – and only marginally – to win by that head as described. The drive of the other driver does not need to be examined.

12. The appellant gave evidence at the first day of the inquiry. And to summarise it, basically he conceded to the stewards that he had stopped driving. Thus the charge and thus their inquiry originally, because as Mr Jasprizza, the Chairman of Stewards on the night of the meeting said in his opening remarks, he was not driving with sufficient vigour from the semaphore board and did not appear to drive the gelding out from that point to the winning post. The appellant conceded on a number of occasions that he had stopped driving the horse.

13. The evidence establishes that the appellant subsequently had conversations with various people and when the inquiry resumed after 29 April on 25 May, the appellant had a lot more to say for himself. It is quite apparent that the gravity of the situation had come home to him, or been brought home to him by others.

14. Some of the evidence does not need closely examination. It is apparent that the appellant's horse, when struck with the whip, had a tendency to hang in. That in doing so, it would lose momentum. That is consistent with

any horse which hangs in and is required to be corrected, some momentum is lost.

15. The appellant struck the horse, it appears, approximately eight times with the whip and it was not responding. It was the opinion of the appellant, supported by the observations of Mr McCall, to whom the Tribunal will return, that the horse had had enough.

16. The video shows the appellant looking closely at the overtaking, or approaching and then overtaking, horse on a number of occasions. The Tribunal is satisfied he was able to make observations of that horse, that it was travelling better than he was and, indeed, overtaking him. The Tribunal is satisfied that in his mind the further use of the whip would not be productive of gaining the best possible finishing place or, as it might be described in the particulars here, driving the horse out.

17. It is interesting that the appellant's version changed by day two of the inquiry. The appellant was then able to tell the stewards that he had reined the horse and continued to yell at him. The Tribunal has to say that from its observations of the tape, it is unable to discern those actions. The evidence establishes that an experienced driver not comfortable in continuing to use the whip, has various actions to enable the horse to be driven out. They involve flicking the reins, running the reins, yelling, using the reins to move the bit in the horse's mouth, all of which are capable of causing a horse to continue to run out.

18. The evidence of Mr McCall, a trainer and driver nationally and internationally for over 34 years, is that the overtaking horse had momentum and that it was his observations of the race that the appellant's horse had had enough and it was resenting the whip. Mr McCall was able to observe – although the Tribunal itself and the Assessor were not able to by viewing the DVD – that the appellant used the reins and tried to get more out of the horse but it had no more to give and that he was doing all he could to urge the horse on.

19. It might also be noted in respect of the appellant's evidence that he was yelling at the horse that the Chairman of the meeting, Mr Jasprizza, when he said that the appellant had stated that he was "just letting it roll forward itself using your voice", said: "And I'm not saying you didn't use your voice." There is, therefore, from the stewards' perspective, no challenge to the use of the voice, one of the means of driving a horse out.

20. Evidence was also given by experienced driver Mr Douglass, who also is the President of the UHRA. He is an experienced driver and the Tribunal is of the opinion he is able to state the opinions that he did. It was his view that the appellant gave the horse every chance to finish. He also made observations, which do not need repeating, which support the Tribunal's

observations of what happened up until the time when the whip ceased to be used.

21. Mr Mann, who is the Secretary of the UHRA – the United Harness Racing Association – is a person with over 50 years' experience in the industry and whose opinions the Tribunal accepts. To the extent that his evidence in his letter of 7 July 2021 remained in evidence, it was supportive of his opinion from his observations of the race itself on TV – and he watched it live – that the appellant's drive was one in which he did all that was required of him. He was able to also make the observations about what happened up until the cessation of the whip use. And also that the appellant's horse had given all it possibly could with the persuasions that had been used up until that point.

22. This case then comes down to the very narrow issue of whether or not the appellant in the last 50 metres did that which the experts and the appellant have given evidence was required to be done, and in relation to at least one of those the Tribunal is satisfied that he continued to yell at the horse, and there is also the appellant's evidence, supported by Mr McCall, that he also used the reins to try and get more out of the horse. Those become, in essence, uncontested facts, despite the inability of the stewards to observe them live, to observe them on the DVD images, and neither the Tribunal nor the Assessor Mr Ellis were able to observe those matters.

23. In essence, however, the Tribunal is satisfied that the use of the whip was no longer a proper course of action for the appellant, not only in accordance with the rule that he could not, by use of the whip, enable the horse to maintain or improve its position and, in any event, it was his assessment that the actions that he did in using the whip in the home straight caused, as expressed earlier, the horse not to run in the true line, requiring correction and that would cause a loss of momentum. That would not be enabling the horse to be driven in accordance with the particularisation of causing it to race fully out to the end of the race.

24. In those circumstances, the Tribunal noting that it is required to be satisfied to a Briginshaw standard, cannot set aside the evidence which indicates he was taking actions at the end of the race to drive it out in circumstances where the actions he did take were appropriate for the exigencies of the race as they then unfolded.

25. The Tribunal does not find the drive of the appellant to be blameworthy.

26. The Tribunal does not find that the appellant has breached the rule as particularised against him.

27. The Tribunal does not find that the appellant has breached Rule 162(1)(z) as pleaded or particularised.

28. The appeal is upheld.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

29. The Tribunal orders the appeal deposit refunded.

SUBMISSIONS MADE IN RELATION TO COSTS

30. At the conclusion of the hearing, the appellant has made application for costs.

31. Clause 19 of the Racing Appeals Tribunal Regulation says that on determining the appeal, the Tribunal may award costs. But there is a very strong limitation imposed by the clause. 19(2) is in the following terms:

> "The Tribunal must not make an order under subclause (1) unless the Tribunal decides –
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> > (c) a party has caused another party unreasonable cost by the manner in which the appeal has been conducted."

32. Subclause 2(c) is the provision relied upon by the appellant applicant for costs. The Tribunal cannot lose sight in the consideration of this discretion that it must do so for the facts and circumstances of this case and not for extraneous reasons.

33. The legislature has been quite clear in fettering the discretion to award costs by the particular opening words "must not" and then that provision is qualified by the necessity for the applicant for costs, the appellant, to establish two things: firstly, that the appellant has been occasioned unreasonable costs and, secondly, that that has been occasioned by the manner in which the appeal has been conducted by the respondent.

34. The submissions in favour of the applicant are, firstly, that the jurisdiction is enlivened, and that is apparent by the upholding of the appeal and that is therefore a determination of the appeal, and relies upon the manner of conduct by saying that the appellant should never have been charged, or any charge brought, and the appeal opposition should have been withdrawn and that those matters should have occurred once the appellant put his evidence on. And that evidence comprised the submissions by Mr Mann, Mr McCall and Mr Douglass. It is to be noted each of them were of the opinion that the charge should not have been brought and that the actions of the appellant were, to paraphrase, blameless.

35. It might also be noted that, in the letters, although not as admitted into evidence, it was the opinions, basically, that the implication of wrongdoing was absurd and there was strong encouragement for the respondent, the regulator, to withdraw its opposition to the appeal.

36. Two principal things were relied upon in the submissions.

37. First the letter of Mr McCall. It will not be read entirely into evidence, his experience is set out. He said the appellant could not have driven his horse any better and expresses why. And the fact that Mr McCall had expressed to the appellant that he had not done anything wrong.

38. That letter, standing alone, does not persuade the Tribunal that, without any other consideration, it would cause any strong-minded and sensible regulator to collapse in respect of its views about how this case should be run. It is an expression of fact and an expression of opinion. It is not of itself so overwhelming that it indicates that opposition to the appeal was unnecessary.

39. The second matter is the evidence of the appellant himself and the fact that he had given evidence about engaging in certain conduct. The Tribunal's decision clearly reflects upon the evidence of the appellant on day one and day two and a minor concession by the Chairman of the meeting about part of the evidence which the Tribunal found established, but there is nothing about the appellant's evidence taken alone which is so overwhelmingly convincing that he should not have been subject of the charge, that the charge should not have been found established against him, nor that the opposition to the appellant's appeal was unnecessary.

40. The remaining pieces of evidence which are said to be of the substance, the Tribunal has made reference to. The Tribunal respects the opinions of Mr Douglass and Mr Mann in respect of the drive. To some extent, those matters have been found successful in the Tribunal's decision. Not all of the matters, it has to be stated, were admitted into evidence, but they provided a foundation upon which the appeal was successful.

41. None of them taken alone, or when those two are taken together, or when those are taken in conjunction with the evidence of Mr McCall or that of the appellant, all become so overwhelmingly obvious that the opposition to this appeal was unnecessary that it leads to a conclusion that the appellant can satisfy the Tribunal on his application for costs, that the conduct of the appellant occasioned costs by reason of the manner in which that appeal was conducted.

42. The respondent has approached this appeal in a quite normal fashion and the Tribunal sees no criticism of the actions that the respondent regulator has taken in the preparation for, nor the conduct of, this appeal, and the Tribunal is certainly not persuaded, as stated in the application, that the actions of the regulator were absurd. Quite to the contrary. The regulator has had a case which was required to be considered, it was not successful, but it did not occasion unnecessary costs by the manner in which it was conducted.

43. The application for costs is refused.