RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

WEDNESDAY 11 SEPTEMBER 2019

APPELLANT JACOB KERRIDGE

AUSTRALIAN HARNESS RACING RULES 190(1), (2) & (4), 193(3) & (8), 193(7) & (8)

SEVERITY APPEAL

DECISION:

1. Appeal dismissed
2. Penalty of disqualification of 4 years 9 months to commence 16 November 2018 and to expire 15 January 2023
3. Appeal deposit forfeited

1. The appellant, a Victorian licensed trainer and driver, appeals against the decision of the stewards of Harness Racing NSW to impose upon him a total period of disqualification of four years and nine months to commence on 16 November 2018 and expire 15 January 2023.

2. The appellant, before the stewards, admitted the three breaches of the rule preferred against him and the stewards dealt with the matter by way of penalty. By his appeal the appellant maintains his admission of the breach of the three rules and appeals against severity of penalty only.

3. The rules in question and their particulars are as follows:

> "CHARGE 1 - Pursuant to AHRR 190 (1),(2) & (4) as follows:
> AHRR 190. (1) A horse shall be presented for a race free of prohibited substances.
>
> (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.
>
> (4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.
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> Particulars:
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> That you Mr Jacob Kerridge, being the licensed trainer of the horse EL KAPITAN, did present that horse to race at Broken Hill on Saturday 27 January 2018 with prohibited substances in its system, namely O-desmethylvenlafaxine and Tapentadol as reported by two laboratories approved by Harness Racing NSW.
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> CHARGE 2 – Pursuant to AHRR 193 (3) & (8) as follows:
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> AHHR 193. (3) A person shall not administer or allow or cause to be administered any medication to a horse on race day prior to such horse running in a race.
>
> (4) Notwithstanding the provisions of sub-rule (3), a person, with the permission of the Stewards may administer or allow or cause to be administered any medication to a horse on race day prior to such horse running in a race.

(5) The Stewards shall order the withdrawal or disqualification of a horse that has been either treated or attempted to have been treated in breach of sub-rules (1), (2) and (3).

(6) For the purposes of this Rule, medication means any treatment with drugs or other substances.

(7) A person shall not allow or permit another person to attempt to perform or perform any of the actions prohibited by sub-rules (1), (2) or (3).

(8) A person who fails to comply with sub-rules (1), (2), (3) or (7) is guilty of an offence.

Particulars:

That you Mr Jacob Kerridge, a trainer licensed by Harness Racing Victoria, did allow medication to be administered to the horse EL KAPITAN on Saturday 27 January 2018, prior to that horse running in Race 1 at Broken Hill on that day.

CHARGE 3 – Pursuant to AHRR 193 (7) & (8) as above:

Particulars:

That you Mr Jacob Kerridge, a trainer licensed by Harness Racing Victoria, did allow Mr Michael Honson and Mr Matt Schembri to stomach tube the horse EL KAPITAN within 48 hours of the commencement of Race 1 at Broken Hill on Saturday 27 January 2018, a race for which that horse was nominated.

4. The evidence has comprised the inquiry transcript and the exhibits before the stewards. The appellant gave brief oral evidence by telephone.

5. The issues here involve the determination of a brief set of facts. The appellant was the subject of an inquiry at the same time as licensed trainer Schembri and registered owner Honson. The question whether the appellant engaged in a conversation with Schembri prior to the conduct for which he faces these alleged breaches or not and whether he engaged in any arrangement with Schembri for the carrying out of the subsequent conduct does not have to be determined on this appeal.

6. On the day in question the appellant drove from his premises in Mildura to Broken Hill to present the subject horse El Kapitan to race. On arrival at the racecourse the horse was stabled and left unattended. The appellant later returned to check on the horse and then later again returned to the stable to

find Honson and Schembri and another person, Matt Johnson, present. It is not necessary to determine whether on these facts a husbandry failure occurred by reason of the leaving of the horse unattended because it is not suggested in the facts available to the Tribunal that Honson and Schembri engaged in conduct, as it were, of a nobbling effect unbeknownst to the appellant.

7. In fact, what was happening was that Honson was administering a drench to the horse and either the appellant or Schembri was holding the horse while he did so. It is the appellant's case that it was Schembri holding the horse and he was supported at the inquiry by Honson to that effect and that the appellant was not holding it. That would be inconsistent with what the appellant said transpired, which is corroborated by Johnson and Honson.

8. In addition to the drench and the drenching equipment, there was present an injection or, in all probability, two injections. The question whether there was one needle or not does not have to be determined, nor how they were made up: a 20 ml injection and a 10 ml injection.

9. The appellant is corroborated by Johnson and Honson as having turned up to the stable at Broken Hill, where the horse had been left, to observe Honson and Schembri engaged in the action of placing the tubing equipment into the subject horse. It was Honson who was carrying out that action and assisted by Schembri. Johnson was standing by observing. The appellant says that upon arrival, corroborated by Honson and Johnson, he said, "What's going on here?" He says Schembri replied, "We're just giving your horse a helping hand." To which the appellant said, "Is any of this legal?" To which Schembri said, "Well, I've never been caught." Honson completed the drenching and the horse was injected. For the purposes of determining this appellant's appeal, it is not necessary to make a factual finding as to who did the injecting. The appellant was present when the drench was administered, the appellant was present when the injections were administered.

10. The appellant has not at any stage denied the fact that he saw what was going on and was aware that it was open to him as the trainer of the horse, as the person to present the horse to race later on at Broken Hill that very day, that he could have said, "Stop." He could have said, "No." He could have said many things. He did not. He acquiesced in their conduct. He did not ask, critically, "What is in the drench?" He did not ask, critically, "What is in the injection?" It was open, therefore, to the trainer of the subject horse, unknowing what was being placed into his horse, to have taken steps to have avoided that subsequent misconduct.

11. The fact is that on a post-race urine sample after the horse had won the subject race, that the Class 1 prohibited substance Tapentadol was found and the Class 2 prohibited substance O-desmethylvenlafaxine was also

detected. It is that they were placed into the horse, in all probability, on the evidence of regulatory veterinarian Dr Wainscott, by the crushing of tablets and their administration by drench, although that does not have to be determined.

12. The three breaches, therefore, involve this appellant in a presentation with a prohibited substance and permitting a medication on race day and allowing a stomach tubing of the horse within 48 hours of commencement of the race. The facts are overwhelmingly in favour of the appropriate admission being made by this appellant of his breach of the rule. He has been caught, as it were, in a totally red-handed fashion by the subsequent presentation determination by a positive urine sample.

13. When first interviewed on 13 March 2018 by investigator on behalf of the respondent, Ms Ackland, the appellant expressed complete ignorance, it might be said, to paraphrase the interview. He was demonstrating a capacity to try and, for the life of him, work out why that prohibited substance as told to him on the first laboratory certificate might have been present and in essence he came up with no possible explanation.

14. He was, however, in a proper turnabout, able after various discussions with Schembri and Honson, to speak to the investigator, Ms Ackland, and to give a complete and frank statement of what in fact he did, and that is in the second interview of 15 March 2018. In that interview the words and admissions to which reference has been made were uttered and he was at pains to point out his regret for his conduct. He explained that he had never done it before. He did not bet on the horse in the race. He described it as a "heat of the moment thing" and he commenced to engage in the aspects of remorse to which he has returned on a number of occasions since by stating to the investigator that "it still falls back onto me. I accept that fully."

15. The appellant was subsequently stood down on 16 November 2018, the horse having been previously stood down on 9 March 2018. The inquiry took place and the penalty of the stewards was imposed in writing upon him on 12 June 2019. The appellant, as has been stated, admitted the breach to the stewards and cooperated with them. He at all times since 15 March 2018 has admitted his failings.

16. The first issue is to assess the objective seriousness of this conduct and then have regard to what appropriate penalty is to be imposed for it and then to have regard to the appellant's personal circumstances – his subjective circumstances – to determine whether there should be any reduction from that appropriate penalty for the objective seriousness of his conduct.

17. In respect of assessing objective seriousness, in some of these matters the Tribunal is assisted by the Harness Racing Penalty Guidelines. For the

benefit of this appellant, the Tribunal states, as it has on many occasions since they were introduced, that it treats those penalty guidelines as simply being that: guidelines and not fixed rules which it is obliged to follow. However, to provide certainty to licensed persons, the stewards, the regulators generally and so the public will have some idea of why penalties are determined, the Tribunal has said that unless there are good reasons to the contrary, it will give due consideration and weight to those guidelines. If nothing else, it provides an aspect of certainty and, more importantly, in the sense of these civil disciplinary proceedings, parity.

18. The facts of themselves are, it is said, objectively serious. A licensed trainer, knowing the horse was to be presented, is confronted with people carrying out what was known to him to be illegal activity very shortly before the horse was to race. He took no steps to correct it. He could easily have done so. He could have done so by stopping them engaging in the conduct in which they were then engaging. He could have done it by himself withdrawing the horse by scratching it. He could have informed the stewards of what had taken place and let them take the appropriate action to scratch the horse and to commence an inquiry straightaway. He did none of those things.

19. The integrity of the industry requires that there be a level playing field. These facts do not require a dissertation on level playing field and integrity to any greater extent. The Tribunal is of the opinion that the objective seriousness of the failure of this appellant on each of these three matters must be viewed at the highest level. It is, therefore, that whatever starting point is considered to be appropriate, that that be the actual starting point, not reduced by reason of the fact that the seriousness is less than might be the case in other circumstances. It being acknowledged this is not an administration case, this is a presentation by permitting others to engage in wrong conduct by medication and stomach tubing, to deal with matters two and three.

20. The penalty guidelines for the first matter provide – and this is a subjective fact in favour of the appellant – that this is his first offence for a prohibited substance presentation matter. It is his first breach of the rules other than in respect of driving-related matters, and the Tribunal disregards those as having any relevance and the respondent does not suggest they do.

21. The penalty guidelines provide a difference between a first offender, a second offender and a subsequent offender. They provide for ever-increasing penalties. Therefore, this appellant was treated by the stewards as a first offender and the penalty guidelines for a presentation matter in these circumstances, with a Class 1 prohibited substance, provided a starting point of five years. If nothing else, for the Class 2 matter, the starting point would have been three years.

22. The stewards determined and the Tribunal considers it is equally appropriate, by reason of the fact that there were two prohibited substances present, that it should look to the more serious one in determining a starting point. The Tribunal does likewise. The Tribunal is of the opinion that the starting point of five years found for a first breach of the rules by a licensed person for this objective seriousness on this presentation is to be five years.

23. The appellant in his grounds of appeal invited the fact that it might be reduced as to the total penalty for this first breach down to a period of 18 months rather than three years that was ultimately determined on the basis that it was a first breach. The appellant is misplaced in his submission by reason of the fact that if it was not a first offence, the starting point would have been in fact 10 years and not five years. Therefore, the penalty that would have been imposed upon him would have been double that which he received, in all probability.

24. The second matter to do with the medication, the injections, are of equal seriousness. It would be repetitive to revisit the facts in determining an appropriate starting point to go through those matters again to reflect upon the appellant's failure and the level playing field.

25. The third matter of a race day administration by a stomach tubing is, in the Tribunal's opinion, equally serious. It is notorious that this industry comes into disrepute by reason of belief in the community of the improper administration of stomach tubing and other treatments – medications and the like – to horses within periods of time they are to race and in particular on race day. It is, therefore, that when this occurs and a trainer allows it to occur that it must be viewed as objectively serious.

26. Absent a penalty guideline on these types of matters, it is a question on the respondent's submission that consideration should be given to what in fact actually turned up in these horses rather than just simply looking at it as an administration of something less sinister such as a bicarb of soda and the like. Here a Class 1 was administered and a Class 2, in all probability by the stomach tubing, and the Tribunal agrees that that is, in determining an objective starting point, to be viewed as a serious matter and the Tribunal does likewise.

27. As to the administration by injection, that is, regardless of what was in the injections, the same. The level playing field was possibly breached, the conduct is totally unacceptable in the minds not just of the stewards and the regulator but of the community at large and, indeed, of all licensed persons who do not engage in such conduct and, more importantly and relevantly to this appellant, all licensed persons who would not permit this type of conduct to take place to their horse when they are not directly engaged in it.

28. Accordingly, the starting points which the stewards determined to be appropriate, the Tribunal also considers to be appropriate. In respect of these matters, it is that there is a starting point for the second matter, the administration of medication, of 18 months, and in respect of the third matter, the stomach tubing within the 48 hours, that a starting point of two years' disqualification is appropriate.

29. The Tribunal only reflects briefly on the question whether disqualifications or suspensions or some other penalty might be appropriate. The objective seriousness of these matters does not permit a consideration of anything other than a disqualification. The grounds of appeal inviting that a suspension be imposed or, alternatively, that some lesser period of suspension be imposed are not accepted.

30. The issue is then what are the subjective circumstances of this appellant which would warrant any further reduction?

31. The stewards took into account and listed a considerable number of matters: first licensed as a harness racing stablehand in 2007, licensed driver in 2010, trainer in 2014. As a driver he has had 1175 drives – a substantial number – and, as has said, has not come under notice for any serious breaches of those rules relevant to these matters. He is a first offender.

32. In addition, he has expressed, quite fairly, the impact that the conduct in which he engaged has had upon his mental health. He quite fairly accepts that he is not supported in respect of that by any professional reports. The Tribunal nevertheless accepts and understands that the impact of being caught out in matters such as this has caused him to suffer substantially.

33. The fact is also, as the submissions touched upon, he has not brought forward any references, and in particular references by licensed people, that might speak in his favour. Those are matters which do not assist him.

34. In addition, it is noted that he has at all times, from the time he made his 15 March admissions, expressed remorse and contrition for his conduct and indicated quite clearly to the regulator, as he has to the Tribunal, that he will not engage in this type of conduct again. He is, as has been said, totally remorseful for that which he has done.

35. The subjective factors also raise issues of financial hardship. As the Tribunal said as long ago as Thomas in 2012, those matters are an inevitable consequence of being caught in the breach of the rules and if an appropriate penalty is found to be there, matters of financial hardship are a regrettable consequence of that conduct rather than a reason for other purposes to reduce the appropriate penalty.

36. The stewards allowed, as will the Tribunal, for the admission of the breach to the stewards at an early stage, and certainly prior to the inquiry, and of the maintaining of that admission of the breach on appeal to this Tribunal and at the hearing, that there be a 25 percent discount for that conduct.

37. The stewards then embarked on what might be seen as other generosity by further reducing the penalties by 15 percent by reason of the way he conducted himself throughout the stewards' inquiry and the cooperation he extended to them from 15 March onwards. Of course, the Tribunal has expressed that the 25 percent, which is a plea of guilty, as it might be described, discount also is conditional upon the fact that an appellant or a person to be dealt with by the stewards must also cooperate with the stewards in the inquiry. If it is merely a plea of guilty without cooperation, the Tribunal would not give a 25 percent discount.

38. Therefore, it is a reflection of the appellant's attitude since his 15 March interview that the stewards very fairly extended to him a further discount of 15 percent. The Tribunal has reflected on whether that is appropriate. It has not been submitted to the Tribunal by the respondent that it should do other than the same. To do other than the same would warrant that this appellant be advised that he might want to withdraw his appeal because he might have a heavier penalty. That has not been the way this case has run and it is not necessary to give further consideration to a Parker-type outcome because the Tribunal is of the opinion that when it looks at all of the conduct of this appellant, that that totality of discount of 40 percent for that which he engaged in when considered from his personal point of view and not from an objective seriousness point of view is an appropriate discount and, indeed, is more than generous.

39. Accordingly, the Tribunal comes to the same conclusion as that which the stewards, after careful and fully expressed reasons, did so. The Tribunal finds no reason to criticise the stewards in their decision and does not do so; it agrees entirely with what they said and found. However, having said that, it is the Tribunal's decision to determine penalty.

40. In respect of penalty, the Tribunal comes to the same conclusion as the stewards: that in respect of these matters, that the period of three years, 10 months and 21 months, respectively, with the same aspects of concurrency and cumulation, be imposed. It is to be noted that these matters should otherwise be cumulative unless a determination to the contrary is made. As a brief matter, the Tribunal agrees that the stewards quite fairly and appropriately found aspects of concurrency and the Tribunal does likewise.

41. In the circumstances, in summary, that period of four years and nine months' disqualification to commence on 16 November 2018 and expire on

15 January 2023 is the penalty imposed by the Tribunal for the reasons expressed.

42. The severity appeal is dismissed.

43. There being no application, the Tribunal orders the appeal deposit forfeited.