RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI
ASSESSOR MR W ELLIS

EX TEMPORE DECISION

WEDNESDAY 11 SEPTEMBER 2019

APPELLANT JOSHUA GALLAGHER

AUSTRALIAN HARNESS RACING RULE 149(2)

DECISION:

1. **Appeal dismissed**
2. **Period of 6 weeks' suspension imposed**
3. **Appeal deposit forfeited**

1. The appellant, licensed driver Joshua Gallagher, appeals against the decision of the stewards of 30 July 2019 to suspend his licence to drive for a period of six weeks. The suspension arose as a result of a finding that he breached Australian Harness Racing Rule 149(2), which is in the following terms:

> "A driver shall not drive in a manner which in the opinion of the Stewards is unacceptable."

At their inquiry the stewards particularised the breach in the following terms:

> "that you, Mr Joshua Gallagher, as the driver of Petes Said So, back at the Bankstown Paceway on Friday, 19 July 2019, have, at or about the 400 metres, elected to remain in a position trailing Bluemoon Rising on the peg line when there was a clear run to your outside to shift your runner up the track at this point, and not taking this run resulted in Petes Said So being held up for the majority of the straight which, in the opinion of the stewards, is unacceptable."

2. When confronted with that allegation at the stewards' inquiry, the appellant entered a plea of not guilty. He has by his appeal and at this hearing maintained that he did not breach the rule.

3. The evidence has comprised the transcript of the stewards' inquiry, the DVD of the subject race, video images of Bankstown 8 March 2019 race 1 and it's race result; video images of Bankstown 7 December 2018 race 6 and it's race result; the form of the subject horse Petes Said So and interview with the licensed trainer Mr S. Tritton. In addition the chair of stewards on the night, Ms Carruthers and the appellant gave oral evidence.

4. The issue is whether the drive was unacceptable, which requires a consideration of the meaning of "unacceptable" within the Australian Harness Racing Rules.

5. The Tribunal, as recently as 21 August 2019, in the decision of Blake Jones (149(2)) took the opportunity to summarise the law which it had found established in the case of Panella (15 March 2012) and in essence, having regard to the submissions in this case, it is a question of determining whether the drive was unacceptable in that it was blameworthy. The assessment of whether it was blameworthy or not will require consideration of all of the facts and placing the Tribunal, as was the requirement on the stewards, to be in the mind of a licensed driver of at least two years' standing.

6. The race was at Bankstown, which is an 800-metre track. It has some issues of tractability. It has a short straight. There is no sprint lane.

7. The meeting was chaired by steward Ms Carruthers, assisted by Mr Bentley. Ms Carruthers made observations from the main tower.
8. There is no issue that Ms Carruthers is experienced to form the opinion that she did and her experience need not be analysed further. The question is whether the opinion was reasonably open to her to meet the test of unacceptability as just defined.

9. Ms Carruthers carried out a form assessment prior to the race, noting in particular it was a small field of seven horses, that she expected the horse Bluemoon Rising, the eventual winner, to have gate speed, and the appellant's horse also to be forward, and the horse that ran third also to be forward. Those matters need not need further examined because it is that there was no issue with the early part of the race.

10. The stewards interviewed trainer Tritton as to the instructions he gave the appellant. Suffice it to say that Mr Tritton's explanation in his interview running over many lines of transcript seems to have comprised a great deal more than he expressed in the two minutes he said he spoke to the appellant than the appellant was able to narrate to the stewards and in relation to his evidence today.

11. In essence, he was told to come out of the gate nice and steady and if the other side was there, to let it go. The "other side" being the stablemate of the trainer, Bluemoon Rising.

12. No instructions were given by Mr Tritton to the appellant in respect of the fact that the horse raced in spreaders, that it was capable of running roughly, nor that it was incapable of being taken wide.

13. The appellant, having not driven this horse either in races or in track work, was of the opinion that the horse, because it wore spreaders, would cause him to have concerns that it might hit its knees and that he therefore was concerned that if he went wider it might cause the horse to hit its knees. The only explanation he gave to the stewards for the decision he made in the race was that the horse wore spreaders.

14. The race as it unfolded, without controversy and with the subject horse Petes Said So racing with tractability, approached the 400 metres – it being borne in mind it is an 800-metre track – and approaching the final turn. The appellant at that stage was only able to refer to the limited pre-form knowledge to which reference has been made and based upon his experience of some two years in relation to the risk of a horse with spreaders being taken wide.

15. He appears not to have known that which is now available to the Tribunal and which demonstrates, by the playing of the races at Bankstown on 8 March 2019 and 7 December 2018, that this horse is capable of being

taken around the field at speed, with tractability, wearing spreaders, and displaying no signs of hitting the knee, and race up to positions in both races from well back in the field to a position where in each case it ran second. This horse has, on the evidence, in its 18 prior starts always worn spreaders and there is no evidence in its form history of it running roughly or losing gait or any statement about its tractability being affected in any other way because it wears spreaders or because it strikes its knees.

16. As said, in this race there was nothing about this horse's tractability to which the appellant made reference in the inquiry, nor essentially other than a view that it had started to lose what the appellant says was up to half a length, not supported by the DVD image, that caused him to pull the blinds on the horse at or about the time that he might have come out.

17. The appellant has driven a horse, therefore, which was capable of and had previously demonstrated an ability to be taken out from either the marker pegs or a one-wide or, indeed, two-wide position to go around a field and race.

18. The 400-metre point is the focus. The options which the stewards opined about were that it was clearly open to the appellant at that point to about the 200-metre point to come out from the marker pegs and from behind Blue Moon Rising and at least trail the eventual winner or, alternatively, to go three wide and commence to go around that winner, it being borne in mind that it was capable of doing so.

19. The other option is that which the appellant elected to take, which was taken, as it is said, merely by a reason that the horse wore spreaders, and that is to remain on the marker pegs and hope his luck would improve as they rounded the final turn and ran down the short straight with no sprint lane. By remaining in that position, it is apparent that it could only be luck that would open up to him because by the time the 200 metres was reached, the opportunity to go wider was closed to him. But for some 200 metres it was open. He was able to go out and follow a horse which was showing full tractability, his own horse showing tractability. The option was clearly available to him and he has not at any stage disputed that. He readily accepted that at the stewards' inquiry and he has readily accepted it in his evidence here.

20. The end result was that having remained on the marker pegs he remained behind another horse, he did not receive a clear run. The DVD shows that right on the winning post he, that is, Petes Said So, was able to appear to come up to a second position but there was a possible locking of wheels right on the winning post, although it has not been the subject of any evidence. Suffice it to say that whatever room was there was never going to be sufficient to come through with a horse that was capable of putting in a

finish, which had all manner of tractability about it and which was racing well, as the DVD shows and Ms Carruthers has given evidence about.

21. The submissions in his favour suggest that he made a split-second decision to remain where he was. The Tribunal rejects that submission. There was ample time in which that decision could have been made, it was anything up to 10 seconds in running time, but certainly over 200 metres, with a horse racing with tractability. There was in fact no effort made to consider whether that option should be taken. It was a closed mind to it, because of the reasons expressed by the appellant that the horse wore spreaders and he did not want to take it out because it would knock its knees and therefore race roughly. There is no evidence, other than a suggested observation on questions of him, that this horse races roughly in any of its prior races when being taken wide. There is certainly no evidence of this horse racing roughly in this race.

22. The failure to take the option which the stewards opined should have been taken meant that this horse was not given an opportunity, for which it was entirely capable on form and in the race, to have been improved in its running and possibly even to have gone around the winner and to have won the race. As is always the case, those are unknown matters. But the way in which the horse remained on the marker pegs right through to the finish of the race is, in the opinion of the stewards, unacceptable.

23. The Tribunal is of the opinion that the stewards have correctly formed that opinion. The Tribunal is of the opinion that it was a reasonable opinion formed by the stewards. The Tribunal is, for the reasons it has expressed on the test that it has indicated, formed the opinion that the drive was blameworthy and blameworthy means unacceptable.

24. Accordingly, the appeal against the breach of the rule is dismissed.

SUBMISSIONS MADE IN RELATION TO PENALTY

25. The issue is one of penalty. The Tribunal has to determine for itself what penalty should be imposed. This matter is a guidelines matter. The Tribunal does not need to revisit its many cases over the years, it will have regard to those by reason of the fact that it provides certainly to all involved in the industry as to the range of penalties that are considered to be appropriate and how they are determined. It is not hard and fast and there can be reasons to move away from a strict application of those guidelines and the stewards themselves very often do so by giving often compassionately increased discounts.

26. This matter carries a starting point of 10 weeks. It is submitted on behalf of the respondent that that is appropriate as a starting point because of the objective seriousness of the drive, and that arises for two particular reasons:

the failure to take what was an option that was patently the better option and the appropriate option, but also the fact that he was driving a $2.40 favourite.

27. The Tribunal is of the opinion that as this was not a split-second error of judgment, it was a failure made, certainly by a junior driver, but an A Grade driver with 869 drives across a range of tracks, including a number of metropolitan tracks. The appellant does not seek to, but the Tribunal is not of the opinion that it should further discount an appropriate penalty by reason of the fact he is classified as a concession driver or a junior driver. It is acknowledged that many junior drivers are entitled to expect that because of their lack of experience, that learning curve, that a mistake they make, if it is not too grave, is one which can perhaps be the subject of further discounts to reflect that.

28. However, this appellant, by reason of the stable he drives for, the reputation that has been said to exist on his behalf and the fact that he has had 869 drives, is not someone other than an experienced driver to be assessed on that basis. And he enjoys the privilege of an A Grade licence.

29. He has not admitted the breach either to the stewards or to the Tribunal and he cannot have that 25 percent discount which flows from such conduct.

30. It is an issue of what other discounts are available, if any. The stewards in their determination called upon the fact that it is his first breach of 149(2) in a period of licensing of some three years. The Tribunal notes his offence report only extends back two years and in fact the first ever adverse determination he had was a suspension on 30 September 2017. He has only had two prior suspensions in that two years and that is, as the stewards fairly reflected upon, a good driving record, coupled with the fact, as said, that it is his first 149(2).

31. The stewards felt a discount of four weeks was appropriate under their usual guidelines and the usual approach they adopted and the Tribunal is of the same opinion. Should he receive other discounts over and above that by reason of a possible stigma that will flow to him or that he has been unfairly dealt with whilst still a concession driver and because of some impact upon him which would be different to that that any other A Grade driver would suffer? The facts simply do not elevate this appellant to a stage where other discounts should be given to him by reason of those or any other facts in this case.

32. In those circumstances, therefore, the Tribunal is of the opinion that the six-week penalty by way of suspension, which the guidelines provide and which the stewards reflected upon, is the penalty that the culpability for this drive, the unacceptable nature of it, should attract.

33. The Tribunal imposes a period of suspension to drive of six weeks.

34. The appeal against severity is dismissed.

35. There being no application for refund, the Tribunal orders the appeal deposit forfeited.
