

**RACING APPEALS
TRIBUNAL
NEW SOUTH WALES**

**TRIBUNAL MR D B ARMATI
ASSESSOR MR W ELLIS**

EX TEMPORE DECISION

WEDNESDAY 14 JULY 2021

APPELLANT JOSHUA GALLAGHER

RESPONDENT HARNESS RACING NSW

**AUSTRALIAN HARNESS RACING RULE
149(2)**

DECISION:

- 1. Appeal upheld**
- 2. Appeal deposit refunded**

1. Mr Joshua Gallagher, a licensed A Grade driver, appeals against the decision of the stewards of 26 April 2021 to impose upon him a period of suspension of four weeks for a breach of Rule 149(2).

2. The part of the rule relied upon by the stewards was in the following terms:

“A person shall not drive in a manner which in the opinion of the Stewards is unacceptable.”

The stewards particularised that breach as follows:

“At the Bankstown Harness Racing Club on Monday, 26 April 2021, in Race 3, where you were the driver of Petes Naholo, in that after withstanding a challenge for the lead in the early stages from A Gift From Heaven, driven by David Morris, you then drove Petes Naholo along with vigour shortly after entering the back straight when challenged by Schouten Island, which was the \$1.40 favourite, and withstood a challenge for the lead until a point near the 900 metres and as a result a first quarter of 27.4 seconds was recorded, with a second quarter of 29.3 seconds, and as a result of these tactics the gelding was under pressure from the 800 metres and tired to be beaten 57.5 metres. In the opinion of the stewards, these tactics were unacceptable.”

3. The appellant had pleaded guilty to the stewards and thus they were not required to express their opinion on a finding of guilt. Upon appeal, he has entered a plea of not guilty and maintained a denial of a breach of the rule on this appeal.

4. The evidence has comprised the transcript before the stewards, the video images of the race and the race form for that particular day for the various races, and the results, together with form of the horses Schouten Island and Petes Naholo. In addition steward chair at the event Mr Jassprizza and the appellant gave oral evidence.

5. The case is an opinion of the stewards case. The Chair of Stewards at that event, experienced steward Mr Jasprizza, has given evidence and it is necessary, under the principles established in McCarthy by the Tribunal some years ago, to determine whether the Tribunal is of the opinion that that opinion of the steward is not reasonably open.

6. It is to be noted that in the evidence today, regardless of the fact that the stewards did not previously directly express an opinion, although it can be inferred from their acceptance of the plea and the subsequent penalty, that today Mr Jasprizza has expressed reasons why in his opinion the drive was unacceptable.

7. It is not necessary to closely examine the meaning of unacceptable; it has its plain English meaning in the context of the rule and the rules generally.

8. There are some matters which can be expressed at the beginning, and they are these: that Tribunals and stewards have always accepted that a driver must have regard to instructions; that in considering those instructions the driver should assess the form of the horse to be driven by the driver and, in addition, the form of other horses in the race; and then, in discussions of proposed tactics with the connections or the trainer, determine, based upon that research, presumably by both, as to whether there should be other discussion on the instructions given.

9. Regardless of instructions it has been the position of the Tribunal and the stewards for a very long period of time that a driver must drive to the exigencies of the race. Instructions cannot cover every eventuality likely to arise and a driver is to be assessed on the basis of their drive on the use of their initiative, not just their instructions, the tactics adopted and an assessment of form.

10. This is particularly the case with an A Grade driver, although in this case the appellant is a little limited in experience in that he has been driving for four years. Nevertheless, he is to be assessed as an A Grade driver, that he has all of the capacity of initiative that an A Grade driver should bring to a race.

11. The Tribunal has been assisted by Assessor Mr Ellis in assessing the evidence and determining an appropriate outcome.

12. The evidence has covered, in some considerable detail, race times, both in the subject race and in other races on this track at this meeting, and at other tracks at other meetings, and also in respect of each of the two horses Schouten Island and Petes Naholo.

13. The Tribunal has determined it will not set out in this decision the very detailed evidence that has been given. The reason for that will become apparent.

14. The other aspect of the matter is that various tracks upon which the subject horses have raced and upon which various times have been determined have also been canvassed in considerable detail. Again, that will not be set out, for reasons which will become apparent.

15. In a general comment in respect of each of those matters of timings and race tracks and generally, it is the case that there is a reliance upon averages and speeds in other races. Averages are, patently obviously, such

that there can be faster than the average and slower than the average. In addition, times and tactics adopted in other races are not always of great relevance because of the exigencies of each individual race and what happens. That is not to say that none of those things are important – they are – and the Tribunal has regard to them but will not analyse them in detail. In many cases, it is essential that those matters be considered in considerable detail.

16. There are two parts in particular about those comments. The first one is that this particular track is one on which the horses were each capable of being driven to lead, and having regard to the fact that they were so far ahead of other horses, the aspect of how they were driven at various parts of the course does not become critical.

17. In addition, there is no doubt, it not being in dispute, that the times run here were exceptionally quick, not only for a race generally but for Bankstown in particular. And they were a first quarter of 27.4 and a second quarter of 29.7 and the half mile at 56.7. The race time itself does not become critically important because Petes Naholo was 57 metres behind the winner when it crossed the line.

18. The appellant has given evidence of his knowledge of the horse Petes Naholo and that he had formed the opinion that it was best in the lead and capable of beating Schouten Island on the basis of the poor form of Schouten Island up until its last race. That, therefore, was in the mind of the appellant.

19. The appellant was given instructions. Those instructions were to come out hard and try to lead. Two things about those instructions: one was that he was to come out hard – and that was complied with and need not be examined further – but secondly, he was to try to lead. His instructions were not of words to the effect of to lead at all costs, do not ever give up the lead and the like. It was “try to lead”. Therefore, his instructions were not of a form which he can fall back on as saying he had to drive in the way in which he did because of instructions.

20. In any event, for the reasons canvassed by the Tribunal, upon initiative and exigencies of the race, it was necessary for him to drive as the race unfolded with those instructions merely in the back of his mind.

21. There are some other principles that can be disregarded. The decision to drive, which has caught the stewards’ attention, was not a split-second decision. That type of consideration can be disregarded. In essence, to be an unacceptable drive, it has to have been blameworthy. That is, not to the standards appropriate for a driver of this experience having regard to all of the matters known to him before the race and during the exigencies of the race itself.

22. The Tribunal has not analysed times in any great detail, for the reasons that follow, but in addition because this unacceptable drive for the stewards occurred over some 1000 metres and over a total period of some 35 seconds. That is an extraordinary distance and period of time.

23. Turning then to the race. The appellant started on the marker pegs in the first line. He drove Petes Naholo out hard. He was initially challenged by Mr Morris for some 200 metres. Mr Morris handed up on that challenge and his horse soon after broke in any event. Schouten Island, driven by Mr Grima, was essentially third outside those two horses, or in their proximity, as they undertook that first challenge. Mr Morris's drive, having gone out of the picture, is not further considered.

24. The appellant continued to drive with pressure and vigour. For a distance of some 1000 metres, Mr Grima drove Schouten Island slightly behind and then nose-to-nose, as it were, with Petes Naholo over that period of some 35 seconds. They were well clear of the rest of the field, some of which had been inconvenienced, as observed on the video images and recorded by the stewards, and in essence the other horses can be totally disregarded.

25. There are various ways in which this drive can be assessed. Going nose-to-nose will suffice. There are many other racing expressions that could be adopted. Some were used in evidence.

26. It was Mr Jasprizza's opinion that, having engaged in that initial challenge with Mr Morris, he should have sought to gain some respite because it was a vigorous challenge. It was Mr Jasprizza's opinion that it could be considered acceptable for Mr Gallagher to race Mr Grima for a period of some 13 seconds out of the total of 35 seconds and that then Mr Gallagher should have given Petes Naholo some respite. He did not do so. The horses raced eye-to-eye throughout the remaining 22 seconds of that 35 seconds of racing time and over that distance of some 1000 metres.

27. Eventually, that contest ended, Petes Naholo tired and fell back. There was nothing that Mr Gallagher did to withdraw from the challenge; his horse did. Mr Grima on Schouten Island went on to win.

28. Mr Gallagher has maintained that he should not be seen to have driven in an unacceptable fashion because the stewards did not deal with Mr Grima on Schouten Island; they only dealt with him. It is therefore to be implied that what he is saying is that if his drive was unacceptable, why was Mr Grima's not, and vice versa.

29. The stewards' answer to that was, to the inquiry and today, that Schouten Island went on to win. Therefore, it is to be implied that Mr Grima

did not drive his horse in an unacceptable fashion because it was not required to be given the respite which the stewards opined should have been given to Petes Naholo and thereby allowed Schouten Island to have some respite. It is implied it was not necessary to do so.

30. It is the evidence of the appellant that he believed his horse was good enough, that it was capable of winning, that the way in which he drove it, because it does best when it leads, was to attempt to maintain that lead. His answer to his failure, as against that of the win by Schouten Island, was that his horse simply was not good enough. Or, in racing parlance, it was ordinary on the day.

31. Importantly, he was of the belief that his horse was capable of such effort from his knowledge of its form. He also said that he had given some thought to giving his horse respite after that initial challenge from Mr Morris but that the way the race then unfolded, he determined that he would not do so.

32. The key to this matter is that the knowledge of the appellant about his horse and his belief that it was capable of maintaining the effort that he asked of it and that he was not of the opinion it was going to tire in the way in which it did and that it would do best if it led, and also driven by his belief, given to the stewards and in evidence, that if he handed up the lead to Schouten Island, he simply would not win.

33. The Tribunal and the Assessor Mr Ellis have debated the propriety of the drive based upon the opinion of Mr Jasprizza – and let it be said the Tribunal accepts his experience and his knowledge and accepts that it was open to him to assess it as unacceptable.

34. At the end of the day, the Tribunal, whilst surprised by what happened and of the viewing of the race, having regard to the times and the distance over which this contest continued, notes in particular that it was not until Petes Naholo tired and gave up, in the appellant's opinion, unexpectedly, that it was essential that the respite which was of concern to the stewards should have been given.

35. Hypothetically, it is possible that because of all of the knowledge, belief and driving that was taking place, that Petes Naholo might have gone on and Schouten Island might have tired and the appellant was entitled to have that belief in his mind for all the reasons he expressed.

36. Therefore, the Tribunal forms the opinion that the stewards' opinion was not reasonably available to them, as acceptable as it is. In essence, it can almost be described as a Briginshaw standard decision, namely, that it is a balance of probabilities case, and having regard to the seriousness of an

unacceptable drive case, that at the end of the day the stewards do not convince the Tribunal that it was unacceptable for the reasons expressed.

37. In those circumstances, it is incumbent upon the Tribunal to uphold the appeal and dismiss the charge against the appellant, and it does so.

38. The appeal having been successful and there being no application by the respondent, the Tribunal orders the appeal deposit refunded.