RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

FRIDAY 6 NOVEMBER 2020

APPELLANT MATT SCHEMBRI

AUSTRALIAN HARNESS RACING RULES 196B(1), 193(1) and 187(2)

SEVERITY APPEALS

DECISIONS:

1. **Appeals upheld**
2. **Charge 3 – Disqualification of 47 weeks (concurrent with Charge 4)**
3. **Charge 4 – Disqualification of 94 weeks**
4. **Charge 5 - Disqualification of 35 weeks (cumulative with Charges 3 and 4**
5. **Disqualifications to commence 16 November 2018**

5. Appeal deposit forfeited

1. The appellant appeals in respect of three charges under the Australian Harness Racing Rules.

2. When he lodged his appeal on 19 June 2019, he appealed in respect of five charges. The stewards initially dealt with six charges and made adverse findings in respect of those matters and proceeded to impose penalty in respect of five of them. The last matter, a charge 6, involved a fail to attend an inquiry, was the subject of a monetary penalty, and no appeal was lodged in respect of that.

3. The appeal was listed for hearing today in respect of the remaining five matters on a defended basis. Yesterday the Tribunal was informed that the respondent, Harness Racing NSW, withdrew charges 1 and 2 and sought to proceed only in respect of charges 3, 4 and 5, and in respect of those matters the appellant changed his plea to guilty. The determination required, therefore, is on a severity appeal basis in respect of charges 3, 4 and 5.

4. Those charges are as follows: charge 3 – AHRR 196B(1):

> "A person shall not without the permission of the Stewards within one (1) clear day of the commencement of a race administer, attempt to administer or cause to be administered an injection to a horse nominated for that race."
>
> Particulars:
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> "That you, Mr Matt Schembri, a trainer and driver licensed by Harness Racing NSW, did within one clear day of the commencement of a race, administered an injection or caused to be administered an injection to the horse El Kapitan which was nominated to race at Broken Hill on Saturday 27 January 2018."

Charge 4 – AHRR 193(1):

> "A person shall not attempt to stomach tube or stomach tube a horse nominated for a race or event within 48 hours of the commencement of the race or event."
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> Particulars:
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> "That you, Mr Matt Schembri, a trainer and driver licensed by Harness Racing NSW, did stomach tube the horse El Kapitan, which was nominated to race at Broken Hill on Saturday 27 January 2018 within 48 hours of the commencement of the race."

Charge 5 – AHRR 187(2):

> "A person shall not refuse to answer questions or to produce a horse, document, substance or piece of equipment, or give false or misleading evidence or information at an inquiry or investigation."
>
> Particulars:
>
> "That you, Mr Matt Schembri, a trainer and driver licensed by Harness Racing NSW, did give false and/or misleading information during an investigation on 5 September 2018 when you were interviewed by HRNSW investigator Ms Natasha Ackland."
> The particulars then set out a series of words that were exchanged between the appellant and Ms Ackland which are not reproduced as this is a plea of guilty. In summary he denied going to the racecourse or doing race day treatments and he subsequently admitted these were false statements.

5. The Tribunal notes briefly that in setting out the rule provisions that each of the subject rules contained a sub rule which dealt with the creation of the offence for not complying with the rule.

6. The evidence on the appeal has not formally been admitted, it now occurs to the Tribunal, but it does comprise a bundle of material and, in addition, a number of authorities. The appeals proceeded on the basis of written submissions received by the Tribunal from the respondent, and for which it expresses its gratitude, and also, again whilst not formally admitted, the submissions made in what was a related betting appeal, (which did not proceed before the Tribunal) of 13 August 2019 which are relied upon. In addition, each party has made oral submissions.

7. As the hearing unfolded, the issues for the respondent diminished. That remark is made because it is necessary to have regard in determining penalty for this appellant to the penalties imposed upon his co-offenders, and they were Mr Michael Honson and the trainer of the horse Mr Jacob Kerridge. Their appeals were dealt with by the Tribunal on 11 September 2019 and penalties imposed.

8. The Kerridge matter can be slightly distinguished because it dealt with presentation matters, but also dealt with 193 matters under (3) and (7), and Honson was dealt with under 193(1) and (3) and 196B(1).

9. As stated, the matters are severity appeals only. It is necessary firstly to determine objective seriousness. In doing so, the submissions for the respondent invite at the end of the day that penalties of 18 months for the injection matter now, with the amended submission, two years for the

stomach tubing and 12 months for the false information, each of which should be served cumulatively. The appellant's position is that lesser penalties should be imposed in each matter and that the injection and stomach tubing matters should be concurrent, and in respect of the false information matter, that it should also not be the subject of cumulation.

10. The brief facts, to put the severity determination in context, are that the appellant was first licensed as a stablehand in 2012, as a driver in 2013 and as a trainer in 2014. On 27 January 2018 he attended at the Broken Hill racecourse, bringing with him drench material and injection material. The appellant has sought to establish before the stewards that the drench material was saline and the injection material vitamins – vitamin C and B12.

11. There was some dispute in the Kerridge and Honson appeals, which has not been agitated here, as to whether there were one or two needles and who actually injected them. Having regard to the nature of the charges, those matters do not have to be determined because they deal with participation in stomach tubing and participation in injecting.

12. Mr Kerridge was the trainer and there was also contested evidence as to whether he was in on this or not; it does not have to be decided for this appellant. Suffice it to say that the appellant and Mr Honson had got together, that they were with the subject horse El Kapitan in a stable where it had been left by Mr Kerridge. Preparation had taken place of the drench. Mr Kerridge arrived and was told that the appellant was just giving the horse a helping hand. When further questioned, the appellant said he had never been caught before, to paraphrase his evidence. Honson and the appellant participated in the drenching of the horse and either Honson or the appellant administered the injections. It is unclear on the evidence and does not have to be decided for the reasons expressed who did what activity.

13. The horse was subsequently presented to race and positives were returned. On the way the case has proceeded, the stewards dealt with the presence of the two prohibited substances, one being a Class 1, the other Class 2, as being aggravating features and increased the Penalty Guideline starting point accordingly. At the end of the day, that is not an approach pressed by the respondent for this appellant. The Tribunal will return to objective seriousness and appropriate starting points.

14. The evidence of Mr Honson was that the appellant had had a bet. He denied that.

15. The inspectors interviewed Kerridge quite early in the piece after the positives came back and the appellant was interviewed by an investigator, Ms Ackland, on 5 September 2018 on two occasions. On both occasions the appellant lied as to his involvement in the matter and essentially denied

any wrong conduct whatsoever. That false information to an investigator led to the 187 breach.

16. The stewards conducted an inquiry on 12 April 2019. The appellant did not attend and was thus not in a position to advance his case on that occasion any further.

17. On 16 November 2018 the stewards conducted an inquiry. Present were Honson (by telephone) and Kerridge and the appellant, who gave a substantial amount of evidence. At the commencement of that inquiry the appellant advised the Chairman that he was actually present when the horse was treated and was concerned to ensure from that point onwards that he would avoid a charge of lying in a stewards' inquiry. He thereafter gave his version of events and of his participation. It might be said he cured his earlier lies to Ms Ackland in that interview by her. Those are the key facts in respect of the matter.

18. The stewards have reflected on many occasions, and various Tribunals, differently constituted, have reflected upon the gravity of non-compliance with the rules, the removal of level playing fields, the destruction of the integrity of the industry and the necessity for protective orders to be made by way of penalty to provide the necessary message to this appellant as to the consequences of acting in breach of the privilege of a licence, but, more importantly, to make it very clear to all other participants that like conduct will lead to a loss of privilege of a licence. It is also important for the message that is sent out to be quite clearly one which will indicate to the public at large that the regulator will take all appropriate steps by removing privilege of a licence from those who transgress the rules.

19. Injecting a horse and stomach tubing a horse contrary to the precise provisions in each of the two rules are done with the specific intention of impacting upon the level playing. They provide an unnecessary advantage to the horse treated and give an advantage against horses which are not so improperly treated. It is objectively serious.

20. Guidance can be obtained by this Tribunal from the Harness Racing Penalty Guidelines, as they then were..

21. The position in respect of these matters is that there is essentially common ground that in respect of the injection matter there be a starting point of 12 months, and in respect of the stomach tubing, a starting point of two years. It again being noted the different starting points that were applied to the co-offenders.

22. In those circumstances it is not necessary to embark upon a more thorough investigation of what is an appropriate starting point based upon

objective seriousness. The Tribunal sees no reason, having regard to those matters, to adopt a different starting point.

23. In respect of the false evidence matter, there is no Penalty Guideline, the general rules apply. It might be noted, as was said in Gallagher by Justice Haylen on 6 October 2010 and repeated by this Tribunal in other matters and by stewards on numerous occasions, the gravity of giving false evidence. And as Justice Haylen said at paragraph 23:

> "Frankness in giving their evidence before stewards' inquiries is not some type of option that may be taken up or declined as they choose. The effectiveness and efficiency of the stewards' inquiry is capable of being fundamentally affected."

And later at 24:

> " … will warrant a severe penalty but each case must be dealt with on its particular merits."

There, for reasons relevant to that case, His Honour imposed a suspension of four weeks.

24. The principle is the same, though. That the stewards' office must be respected. The power of the rules that mandate a giving of true evidence are reflected in this rule. And the necessity for that proper compliance is obvious. Licences carry a privilege. That privilege not only requires compliance with the rules but cooperation with the stewards otherwise giving false evidence to an investigator can cause an inquiry not to reach a fair and just conclusion, and that is not just to the subject of the inquiry but to industry participants at large.

25. Here the objective seriousness of this breach is seen as lessened to that which was before Justice Haylen in Gallagher, and in respect of other matters, because the falsehood was given to an investigator, not a steward. That is not to lessen the office of investigator nor the importance of truth to an investigator, as a falsehood to an investigator can lead to the same problems just enunciated as would lead to a steward.

26. But the second lessening gravity factor is that it was not made at an inquiry but prior to inquiry and the lessening of gravity is reflected in the fact that at the commencement of the inquiry the appellant came clean. Therefore, the nature of the inquiry which the stewards had embarked upon was much less onerous for them than would otherwise have been the case. In any event, these stewards had before them very powerful evidence from the investigation that Ms Ackland and others undertook beforehand with the interviews of co-offenders and of a witness, a Mr Johnson. It was therefore that the stewards were not greatly

inconvenienced or led down wrong paths of investigation by reason of the falsehood.

27. Parity cases on objective seriousness are important. They have not formed part of the matters to be determined on charges 3 and 4, but they have in respect of the falsehood matter.

28. The first cases put forward is the stewards' inquiry of 13 September 2017 in the matter of Carroll, who faced breaches of 187(2), (3) and (6), and in respect of the falsehood, received a nine-month disqualification. It is to be noted that that was a falsehood given to stewards.

29. Another matter was Fletcher, a decision of 26 July 2017, a 187(2) matter, which was a falsehood to an investigator, and a six-month disqualification was imposed.

30. There is a matter of Ford before the Tasmanian Review Board of December 2017 – as is often the case, different penalty regimes can lead to different outcomes – and in that case a six-month disqualification was given for a 187(2).

31. There is then the June 2020 matter of Hayward where he received a 12-month disqualification for a 187(2) matter at a stewards' inquiry in respect of with whom he had been in contact in 2014.

32. There is then the matter of Gallagher, to which reference has been made and which is not relied upon as a parity case by the appellant today.

33. It can be seen, therefore, that the two more serious penalties, where the lie was at the stewards' inquiry itself, that firstly in Carroll to nine months and secondly in Hayward to 12 months. The parity case of Fletcher dealt with the falsehood to an investigator, in which there was six months.

34. Objectively, the seriousness of this matter is lessened by reason of the fact that, as expressed, it was to an investigator and cured immediately at the inquiry. It is unclear from the facts whether Fletcher embarked on a similar purging of his guilt to the stewards.

35. The history of this appellant is such that the lie, when it was embarked upon, was not first conduct of a similar nature by this appellant. He had lied to Racing New South Wales investigators on an Australasian Rule of Racing matter on 11 July 2018, prior to this investigator's interview of 5 September 2018. He had engaged in the subject conduct of injecting and drenching on 27 January 2018 and had engaged in similar conduct at Broken Hill on 17 March 2018, but had not then been dealt with for either of those aspects of conduct when he embarked on the lie.

36. Those facts do not warrant a more severe penalty being considered on a starting-point basis.

37. The Tribunal is of the opinion that the objective seriousness warrants a starting point between that considered appropriate in Carroll and that considered appropriate in Hayward. The parities in respect of the matter of lying to the stewards of either nine months or 12 months has a final outcome against an investigating matter of six months in respect of Fletcher.

38. Having regard to the gravity of the conduct to which the lie related, the Tribunal is of the opinion that a starting point of nine months is appropriate.

39. It is then a matter of looking at the subjectives.

40. The appellant, as of August 2019, was 29 years of age. He was born and raised in Broken Hill and raised in the sport of racing, in particular, harness racing. At that time he had a desire to spend the rest of his life in the harness racing industry. He says he had always stayed out of trouble and walked away from trouble. His extended family is still involved in this industry and provide sponsorship. It is a family participation.

41. He says he does not drink alcohol, take drugs or smoke cigarettes, but acknowledges quite plainly that he has a gambling problem. He expresses how he has left school early and accordingly his understanding of the written word is not what he would prefer it to be because, and quite understandably so, he describes himself as having been an outdoor kind of child.

42. He describes how the family provides assistance to the homeless in Broken Hill and looks to find them jobs, a subjective factor that certainly is a matter that is favourable to him. He describes assistance with the local pony club and riding for the disabled. And he also participates in rehoming of horses. He has always cared well for his horses. He has been a promoter of the industry.

43. It is necessary then to have regard to what discounts are to be provided.

44. The first matter is in respect of the plea. In that regard the Tribunal notes that in each of these matters he made no admission before the stewards when they were required to conduct their inquiry, come to their conclusions and impose penalty. They gave him no discount, and nor would they. He then pleaded not guilty on appeal and this case has been prepared, right up until its virtual commencement, on a defended basis. The Tribunal cannot lose sight of the time, trouble and effort to which the appellant has put the respondent in respect of its preparation to answer

issues involving expert evidence to do with the drugs that related to charges 1 and 2.

45. The plea was very late. At least it was made before the commencement of the hearing. But its utilitarian value is extremely diminished. There was no suggestion he should enjoy the benefit of the full discount for an early plea of guilty and cooperation with the stewards. In respect of that latter point, his cooperation would be diminished in any event by reason of the fact that he is facing here a charge of a falsehood.

46. The Tribunal will not use, therefore, purely for the late pleas of guilty, a discount as high as 10 percent, which might accord with parity decisions. And the reasons for that will become apparent.

47. The Tribunal has to assess those subjective factors to which it has made reference, and there is some benefit from them. The Tribunal has seen no expression of remorse in respect of these matters. The Tribunal is deeply troubled in looking to the future and finding a protective order of the history relating to this appellant. The objective seriousness considerations do not permit a consideration of those other matters to provide elevated starting points. But those other matters cannot be lost sight of. They are matters which are very relevant to whether or not there should be a loss of other leniency. That is, is there a prospect of reoffending, which itself, if the appellant does not satisfy he will not, must lead to a subjective determination which has with it an aspect of expressed concern for the protection of the industry at large.

48. That history to some extent has been referred to. But he has been dealt with for a stomach tubing in the racing world. He was subject to a final determination by the Racing Appeals Tribunal on 13 December 2019 that he had stomach tubed, and also the Tribunal cannot lose sight of the fact that he was also dealt with there for falsehoods.

49. Subsequent to his conduct here he has been dealt with for betting-related matters, which have led to a recommencement of the imposed penalty from those racing matters, together with penalty in respect of his betting conduct, both betting before he was disqualified as a driver and afterwards as a disqualified person. Those matters were the subject of an appeal which has not proceeded. He is not re-punished for those matters in this protective order but they are relevant to the prospects of reoffending.

50. Therefore, in looking to further reductions on a subjective basis, the Tribunal determines that the objective seriousness of his conduct, coupled with the number of matters with which he has been engaged, means that further discounts should not be given to him on the basis the Tribunal is not comforted by an expression of remorse that he will not reoffend. That

means the protective message must be a greater one than the subjective factors would otherwise have required.

51. Considering all of those matters, the Tribunal has determined that there will be an approximate 10 percent reduction, which will encompass the limited utilitarian value of the late pleas, together with some credit for the totality of his subjective factors.

52. The effect of that is this: that the Tribunal determines that it will deal with the more serious matter, charge 4, the stomach tubing, first. The starting point was 24 months. That is the equivalent of 104 weeks. There will be an approximate 10 percent discount. That is a discount roughly of 10 weeks, it need not be a precise figure. That leaves a period of 94 weeks, for which there will be a disqualification, and it has not been submitted to the contrary.

53. In respect of the injection matter, with a starting point of 12 months or 52 weeks, again an approximate discount of 10 percent, which is roughly ive weeks, leaving a period of disqualification – and it is not submitted to the contrary - of 47 weeks.

54. In respect of the falsehoods, there will be a starting point of nine months, which is equivalent to 39 weeks, for which will be an approximate 10 percent discount, which is a period of roughly four weeks, leaving a period of disqualification – and it is not submitted to the contrary – of 35 weeks.

55. The next issue is whether they should be concurrent or cumulative.

56. The Tribunal has set out the parties' submissions on those matters. The Tribunal is of the view that the gravity of the conduct here should lead to some means of cumulation in respect of the stomach tubing and injection. There are reasons why it should not be entirely cumulative and they are that this was one series of events. It was on the same day. It involved the same participants. It involved essentially a continued course of conduct, both by stomach tubing and injecting over a short period of time, and involved one horse to go to one race only.

57. The reason there might be consideration of partial cumulation is that there was in fact two separate wrongful conducts. It would not be fair to other participants who merely stomach tubed or merely injected that a person should only receive the same penalty if they embarked in one set of conduct only.

58. In the end, however, the Tribunal must look to what happened with the co-offenders. This appellant is entitled to say, where possible, if the facts and circumstances are appropriately the same and the breaches are appropriately the same, that "I should have a similar outcome to them". In

that regard, they received concurrent penalties. The Tribunal does not consider it appropriate, therefore, that the partial cumulation it would otherwise have imposed be imposed. In addition the parties did not invite it.

59. Accordingly, in respect of both charges 3 and 4, those penalties will be served concurrently, which has the effect of the imposition of a period of disqualification of 94 weeks.

60. In respect of the falsehood matter, that is a separate set of conduct on a separate occasion, and which there is no co-offender relationship, and on which the Tribunal considers that, consistent with parity cases, that penalty be cumulative.

61. Accordingly, that extra period of 35 weeks will be served cumulatively to the period of 94 weeks.

62. The next issue is the commencement date of those periods of disqualification.

63. The stewards determined that the date of 16 November 2018 be the starting point and there is no submission to the contrary. The Tribunal must note that there was reflection from the Tribunal to the parties in respect of related matters to do with Racing New South Wales and also in respect of the betting offences and he will not receive effective cumulative penalties. At the end of the day the Tribunal is not asked to adopt a different starting point.

64. The starting point, therefore, is 16 November 2018 in respect of these penalties.

65.The Tribunal has quickly looked at a diary, and while it is not required to express a definitive starting point, and subject to errors and omissions being excepted, and subject with liberty to apply in respect of any miscalculation, that would appear to expire on 17 May 2021.

66. That means, therefore, that in respect of these matters, the severity appeals are upheld.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

67. There being no application in respect of the appeal deposit, the Tribunal considers, having regard to the total history of the matter, it should be forfeited, and that will be the order.
