RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

WEDNESDAY 1 NOVEMBER 2017

LICENSEE NATHAN TURNBULL

AUSTRALIAN HARNESS RACING RULE 190(1)

SEVERITY APPEAL

DECISION: 1. Appeal upheld
2. Penalty of 3 months disqualification imposed
3. Appeal deposit refunded

1. Licensed trainer and driver Nathan Turnbull appeals against a decision of the stewards of 18 September 2017 to impose upon him a period of disqualification of two years and six months for a breach of Rule 190. The stewards particularised the relevant rules as follows, 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."

The stewards particularised the breach as follows:

> "… that you, Nathan Turnbull, being a trainer licensed by Harness Racing New South Wales, was the trainer and person responsible for the presentation of the registered horse Destiny Warrior for Race 5 at Dubbo on Wednesday, 22 February 2017, following which a urine sample taken from Destiny Warrior upon analysis by 2 approved laboratories have issued certificates purporting (sic) the sample contained benzoylecgonine, and ecgonine methyl ester. They are recognised by the symbols BZE and EME, which are substances prohibited under the rules."

2. When confronted with that allegation, the appellant pleaded guilty. He has maintained that breach of the rules on this appeal and this is a severity appeal only. Accordingly, the need to analyse the facts is reduced.

3. The presentation occurred in February 2017. As the certificates of positive readings came in, various interviews were conducted by the stewards with some of the persons involved in this matter and subsequently the inquiry was held on 21 August and in a very lengthy detailed written decision of 18 September the stewards found the reasons for penalty.

4. The case essentially is a contamination or transference case. Briefly, the issue is did an unlicensed person, Mr Davis, cause contamination or not?

5. Davis was previously licensed and at the relevant date was not licensed. He was collected by the appellant and a Mr Williams on their way to the racetrack on the day. Mr Davis had consumed cocaine on that day and before he was picked up he used a $20 note to snort that cocaine and then placed that note in his wallet. On arrival at the racecourse, he gave that $20 note to the appellant who then handed it to a ticket agent.

6. Whilst there was some conflict in the evidence, Mr Davis gave evidence that upon arrival and upon him alighting from the vehicle, he handled two geldings. There were five horses, four of them were geldings. He is not able to identify any of the horses he handled by name or description, other than the fact they were geldings. He put a stallion chain on the horses and walked them to the nearby urine stall. He held them. He then tied them up. He then went about his business.

7. The evidence about the $20 note and the use of cocaine is not an issue. The evidence on whether Mr Davis handled the horses is.

8. When originally interviewed, Mr Davis said in April 2017 he had. Mr Williams, another licensed person who travelled with him, said he did not and that he immediately went to the bar, as was Mr Davis' usual practice when given a lift. Mr Turnbull, the appellant, had no recollection of it happening and said it would not have happened if he had observed it to be happening, but was not a hundred percent certain in his recall.

9. It is an accepted fact that Mr Davis showed no signs of cocaine use on that day. Mr Davis at the time was a regular cocaine user. He was on a suspended prison sentence for various crimes. The appellant, Mr Turnbull, gave evidence that Mr Davis was a friend, a friend of long-standing, a person with whom he obviously had a great deal to do. It is apparent from the stewards' inquiry when Mr Turnbull said (transcript 28.20):

> "I knew he took it but, like I said, I didn't – I wouldn't have thought he would have took it on a Wednesday afternoon to come to the trots with me, which I said before."

Transcript 36.30:

> "I – like I just had before, I knew he touched – like I didn't know he had so much of a cocaine habit. I didn't."

And later:

> " … but I knew he had touched it in the past, and he has talked about it and says he does it at, you know, social events or whatever or parties or whatever he does with his friends in Orange. But, like I said, our group of people we don't touch it, and I guess it's not something he talked about with us."

10. There is a great deal of evidence about those types of matters and a weekend visit that the appellant, Mr Davis and others took to see the racehorse Winx race in Sydney. Those matters do not need to be further looked at because, as the Tribunal has said, there is no doubt that Mr Davis consumed cocaine on the day.

11. One other matter about the relationship between Mr Turnbull and Mr Davis, and that relates to the evidence Mr Turnbull gave at transcript page 42.26, when asked this question:

> "Have you ever asked Damien had he been registered?"

Answer:

> "No, I hadn't asked him because I knew he wasn't. I knew he had a trainer's licence obviously before."

12. Therefore, as the Tribunal has said, it concludes that Davis used cocaine on the day. No other source of cocaine contamination or transference has been identified.

13. The evidence establishes, through regulatory vet Dr Wainscott, that the BZE had a reading of 8 and the EME a reading of 7.

14. In evidence is a well-recognised report entitled: "'Trace' Benzoylecgonine Identifications in Post-Race Urines: Probable Sources and Regulatory Significance of Such Identifications", a paper in the AAEP Proceedings, Volume 52, 2006 at 331, the authors being Camargo, Lehner and Tobin. The Tribunal has been taken to that report in some detail.

15. The key points about it are these: that it looked at BZE as the major urinary metabolite of cocaine in horses and often identified at trace level concentrations in post-race urine. It was also noted that in America, where this research was conducted, paper currency is commonly highly contaminated with cocaine. It is acknowledged that other metabolites of cocaine other than BZE and EME can be detected. The report said that exposure of animals or humans to very small amounts of cocaine gives rise to relatively high urinary concentrations of BZE. It is also said that the spread of cocaine by casual contact is consistent with the fact that it is readily absorbed through human skin. Dermal and mucosal exposures of horses may result in the presence of cocaine metabolites in urine. This is important, because if any handler of a horse is exposed to cocaine, he or she may inadvertently expose the horse to the small amounts of cocaine that readily yield detectable BZE levels in the horse's urine. And it continued:

> "In terms of cocaine as an environmental contaminant, these data show that exposure of a horse to the amount of cocaine not uncommonly found on a dollar bill in general circulation can trigger a BZE identification."

And, importantly, the report determined that there needed to be an administration of some 50 milligrams of cocaine to a horse before there could be any possibility of a performance-enhancing effect. The report continued to note the levels of thresholds established in various United States' jurisdictions which, for the six identified jurisdictions, range from 50 to 300.

16. It is established that in this jurisdiction of New South Wales, no threshold for cocaine and its metabolites has been fixed. It is, therefore, that even a trace detection is a breach of the rules. It is that a reading of 8 and 7 respectively is a breach of the rules.

17. Dr Wainscott, regulatory vet, gave evidence to the stewards, having confirmed that the two metabolites, BZE and EME, are metabolites of cocaine and that it is a prohibited substance. And having referred to the Camargo et al paper, gave evidence that, (once the stewards' transcript is corrected), a very, very small amount of cocaine is sufficient to produce a BZE concentration of around 20. The extrapolation therefore is that to produce a BZE of 8, as was the estimate here, there would need to be one-65-thousandth of a teaspoon of cocaine. That arises because he gave evidence, (once corrected), that one-25-thousandth of a teaspoon will give a BZE of around 20. It is apparent, therefore, that the amount of the metabolites detected here was extremely miniscule and, indeed, many adjectives could be placed in that expression.

18. Importantly, Dr Wainscott continued, at transcript 34, when asked about the possible transference by a $20 note of Mr Davis, the following:

> "I think the inference is that only very small amounts of cocaine are required to produce detectable concentrations, and in the case of a note that has been that day used to administer cocaine to Mr Davis, it is a feasible proposition that that could have been the source of the problem."

19. And later, at transcript 35, he said this:

> "As Mr Davis said, he put a chain on the horse. Well, he is handling a horse around the mouth, and the cocaine is readily absorbed through the oral routes and these sort of things, so there is a possibility to consider as well."

20. He was then asked questions about hand washing and the like, something that Mr Davis had reported he does not engage in.

21. The conclusion that is able to be reached, therefore, is that as Mr Davis had consumed cocaine, and having regard to the expert evidence of Dr Wainscott, consistent with the material in the report of Camargo et al, that it

only requires minuscule amounts of cocaine to produce the BZE and EME readings that existed here, it is therefore consistent with the evidence that the known contaminating source – Mr Davis – in respect of both the use of the note and the handling of the horse, are options to be considered. What of that likelihood?

22. In submissions today, the respondent says that the note could not be the source, for the following reasons: firstly, the difference between the American currency, as referred to in the Camargo et al report, and the polymer-based currency in Australia. There is no evidence about the difference between the two. There is no reason to reject the hypothesis because there might be some difference between the texture of a note and its capacity to retain on it a trace of cocaine. In view of the minuscule amounts required, there is reinforcement that that possible difference in the notes can be disregarded. It was then said that Mr Davis would have had to have done, and the others would have had to engage in, the following series of actions. He would have had to, at the conclusion of his snorting exercise, unrolled the note and put it in his wallet and it would have remained in place in his wallet. He then had to remove it from his wallet and handle it and give it to Mr Turnbull. Mr Turnbull then handled it and passed it on to another person. Mr Turnbull then continued his driving of the vehicle, was engaged in the securing of the vehicle and the removal of the horses and, indeed, it is said there is no evidence that Mr Turnbull handled the horses at all.

23. As against that, there is the very strong evidence from Dr Wainscott, consistent with the report of Camargo et al, that very, very minor amounts of cocaine could have remained as a source.

24. The Tribunal is satisfied they might have remind as a source, and, on the balance of probabilities exercise, is satisfied that that remains a possible source.

25. The second matter is the contamination by Mr Davis handling the horse. It is said by the respondent that is the only possibility but that has now been rejected as a proposition and that, in any event, the evidence of Mr Davis should have been rejected on the basis that he was a friend overstating what he had done and was contrary to the other evidence. If he was to have handled it in any event, it is submitted that that raises an aspect of culpability in the appellant by reason of his committing a breach of the rules of racing to allow that to take place. There is no doubt that knowing that Mr Davis was unlicensed, if Mr Turnbull permitted or otherwise turned a blind eye to Mr Davis handling the horses as the Tribunal has described it, that he would be breaching Rule 204 in conjunction with Rule 226. That is a matter for others, it simply goes to an issue of husbandry.

26. It is also said that in any event permitting Mr Davis to handle the horse when Mr Turnbull knew he was a long-term drug user was of itself a

husbandry failure when the very strong policies that have been put in place by the regulator, Harness Racing New South Wales, are considered. There are two policy statements before the Tribunal, they are the Drug and Alcohol Policy of 2012, which refers to offences for persons affected by drugs handling horses, and that that applies to stablehands, trainers and the like. There is also a second policy, the Animal Welfare Policy, which appears to be undated, which is a policy to do with the welfare of the registered standardbred and to do with matters to do with transporting and drug control relating to animals, and also issues in respect of biosecurity and a strong duty of care which a trainer cannot transfer to another person.

27. On behalf of the appellant, it is said that the capacity to use the handling as a possible source of contamination is highly speculative because of the facts earlier set out about his inability to identify the subject horse, nor the fact that only at most he handled two and there were four geldings.

28. The Tribunal is satisfied this is a contamination case, as it has said now on a number of occasions. Accordingly, the principles that might be said to arise for consideration when that is not the fact do not need to be given greater weight, that is, the fact that in a presentation case the regulator does not have to establish how, when, why or by what route a particular drug came to be present.

29. The objective failures of the appellant here are the circumstances of his knowledge of Mr Davis' drug use, and the fact that it was a race day. It must be acknowledged that he did not know, and had no reason to suspect on his presentation, that Mr Davis had consumed cocaine on the day, nor did he have reason, therefore, to consider that the note that was handed to him might be a cause of the transference of cocaine to him.

30. Because of the strong regulatory regime in which this appellant is licensed, and on a privilege of a licence, because of the two policies on animal welfare and drug and alcohol, because of the very basic but simple set of rules about unlicensed persons and licensed persons, and about a regulatory regime which prohibits cocaine in any shape or form, that there is a failure of the appellant to meet his overall obligations.

31. The penalty guidelines, which have existed for some time now, provide for a class 1 substance such as cocaine to have a starting point of five years when there are no prior breaches. It is to be noted that there is no threshold in respect of cocaine, therefore, any base presentation enlivens the five-year starting point. However, objectively viewed, the Tribunal does not find that the bare facts which it has set out warrant a five-year starting point without consideration of any other factors. It considers a lesser starting point is appropriate, for these facts.

32. Integrity must be given weight. The Tribunal is satisfied integrity is an issue here. Cocaine is a prohibited substance. It has no place in the community as its possession and use is a criminal offence. It has no legitimate use in or about racehorses in any fashion at all or, indeed, about any animal at all. A presentation case in respect of cocaine, therefore, does raise issues that a message must be given to the community at large and to the individual trainer that such matters warrant sanction. The Tribunal does not accept the appellant's submissions that a low level such as here does not raise issues of integrity.

33. The stewards in their decision set out in detail a number of statements of this Tribunal in respect of a number of principles to be applied. They need not be detailed in this decision. In the Racing NSW case of Smith, August 2015, the Tribunal reiterated that it is appropriate to ensure that every horse runs on its merits uninfluenced by substances which may cause it not to run on its merits, that is, prohibited substances. However, it must be accepted that there is no evidence at all, and it is to the contrary, that the amount of substance here had no performance-enhancing effect at all. It can be concluded, perhaps equally, although the report did not refer to such matters, that it could not be a performance-retarding effect. So, Smith, whilst it is correct about integrity, is not a directly relevant case.

34. They also quoted the Tribunal in McNair, again a Racing New South Wales case, that on race day an appropriate level of security for a horse about to race is much greater than it would be at other times. Relevant to this case, that the appellant knew it was race day and so much greater was the obligation upon him to ensure that everything proper was done such that the horse was not presented with a prohibited substance in it. The facts that have been referred to that stand in his favour about the lack of any objective signs in Mr Davis about cocaine use on the day in question must, of course, be given great weight when that principle is considered.

35. As to his subjective circumstances, he was at the time of the stewards' inquiry 35 years of age. He had been licensed over 15 years in various categories, although not continuously in that time. The precise gaps are not able to be determined. He is a professional driver and trainer and 75 percent of his income comes from that training and the rest from his driving. He has no prior matters of any relevance at all, in particular, no prior prohibited substance matters. He co-operated fully with the stewards and has continued to do so right up to the present time. He has had numerous other presentations where testing has been negative. He has entered an admission before the Tribunal and the time taken before the stewards and this Tribunal has been much reduced.

36. Early in the proceedings he put to the stewards a number of references. They have not been canvassed in detail here but they are telling documents. They were put to the Tribunal in a stay application.

37. The first is by Martin Simmons of Elders, 11 April 2017, known him for 25 years, knows him as a member of the harness racing fraternity, looks after horses for Mr Simmons, he is extremely professional and honest and takes pride in his work, he is a hard-working man and is a mentor for the next generation in harness racing.

38. The next is by Michael and Melissa Hawke, 12 April 2017, known him for over 10 years, no issue with him doing driving and training for them, he is reputable and is a positive and professional person, and they believe he had no involvement with this incident and would not be guilty of this charge. He is a kind-hearted and generous person.

39. The next is by Mathew Rue, 12 April 2017, refers to marriage of his first cousin Carley to the appellant, and licensed himself for a number of years, and assesses the appellant as young, honest and hard-working and training many horses. He considers him completely innocent and says he was unaware of the actions of Mr Davis and it would be unjust not to allow him to continue to operate in the industry.

40. The next is by Chris Frisby, 12 April 2017, has been a licensed trainer and driver etc for 38 years, shocked and in disbelief and a belief in his innocence.

41. The next is by Bernie Hewitt of 12 April 2017, himself a long-standing professional person in the industry. Expresses complete shock and would have no hesitation in allowing him to continue to train and drive.

42. The next is by Angela and Nathan Hurst, undated, known him for 15 years and they are friends, a person who is nothing but helpful and professional.

43. The next, another undated, by Phoebe Betts, a young 14-year-old for whom the appellant assists with mini-trotting and looking after her horses.

44. Some of those references may in other circumstances be the subject of criticism because they refer to the appellant's innocence. It is to be recognised that they were given on a 183 suspension matter and the appellant has pleaded guilty. Those references to his innocence are taken to refer to the fact that he is unaware of the circumstances of Mr Davis' conduct and not as to his lack of culpability for a breach of the rule. It is to be noted, as is often the case, that the Tribunal gives weight to the fact that the majority of those people are licensed persons and, when it comes to an issue of integrity, and therefore of the general message to be given to the industry at large, that they consider that he would be welcome back into the industry.

45. In addition, it is apparent from the tenor of those various references that so far as the need to give a specific message to this appellant is concerned, that that is diminished by reason of the strength of character that he has and their belief that he has acted appropriately at all times and therefore the likelihood of repetition is much diminished. And on the issue of the likelihood of repetition and looking to the future, there is no doubt that the salutary experience to which the appellant has been subjected in respect of these proceedings and the consequences that are possible and available will ensure that he changes whatever failures he has had in the past for the benefit of the industry in the future.

46. Parity cases are referred to.

47. To that extent, Waterhouse in particular was relied upon. It is now a 2005 case. It is ageing. It pre-dates the penalty guidelines, it pre-dates the 2011 green light scandal in this industry and the stronger attitude taken by the regulator, in particular, the stewards and this Tribunal, since 2011 in respect of prohibited substance matters and other aspects of breach of the rules. It also is a different code and applying different rules. Waterhouse involved a stablehand and cocaine. The Appeal Panel there found that the presentation could not be attributed in any blameworthy way to any act or omission of the trainer and numerous other facts. In that case no penalty was imposed. The Tribunal considers, for the reasons just expressed, that that matter can be distinguished, but also on the basis that it is not prepared to make a finding, as it has said, that this appellant was not blameworthy in some way.

48. Next is the matter of Waller, again a Racing NSW matter. Again, a licensed trainer who has had drugs amongst employees. In that matter the Appeal Panel determined that a monetary penalty of $5000 was appropriate on the basis of a number of findings, particularly his subjective factors, and also on the basis of some aspect of ignorance despite practices that he had in place, and it was felt that the necessary message to be given was not more than a need to impose a monetary penalty. Importantly, it was said there is a limit to the intrusions an employer can make into their employees' private lives and conduct. Setting aside the intrusion aspects here, that case can be distinguished, again for the reasons of the blameworthy conduct to which reference has been made.

49. The Tribunal is today taken to the Queensland Racing Disciplinary Board decision of Rasmussen of 22 December 2015, and briefly the facts were that, completely unknown to the trainer, arsenic was present in various timbers about her stables, the horse chewed the timber, the horse produced an arsenic reading. There had been no warnings about the possibility of that happening. It was found that there was no reason why that might have been anticipated and no penalty was imposed. For the same reasons as the other matters, that case can be distinguished.

50. The Tribunal was taken to the VCAT decision of Mr Butcher of 2 May 2017 in the matter of Neagoe, a harness racing matter, where it was determined that a six-month disqualification was appropriate once aspects of contamination could not be found on the basis of a lack of evidence, but applying, what was there described, as principles of general deterrence.

51. The stewards turned to a number of other decisions. It seems to the Tribunal that each of those have their own facts and meanings and do not have a great deal of weight in respect of the decision on the facts now found.

52. Reference was made in passing here to the recent Racing NSW stewards' decision in the matter of Quinton, a cobalt case. No penalty was referred to in their decision, they actually did not make an order that there be no penalty. But it is quite apparent from what they said in their reasons for decision that that was the conclusion they otherwise meant to express on the basis that there they had a substantial amount of evidence that the cobalt in the presented horses was caused by contaminated feed at levels which were vastly in excess of any expected level of cobalt either expected by any trainer or, indeed, by what was expressed on the label of the products and where substantial testing was carried out which demonstrated that it was that feed, somewhat ingenuously called Phar Lap feed, which when presented to other horses caused increased levels and when all the other horses in his stable were given other feed, they had no increased levels. That case does not have sufficient parity to go any further here.

53. The conclusions the Tribunal reaches are these. That the subjective factors are very strong. The objective failures have been summarised and are viewed at the lower end of the scale of seriousness. Essentially, they involve, to summarise again, a knowledge in a person of past cocaine use, unexpected on the day, but in a regulatory regime where there was attendance at race day in circumstances where various policies imposed, in addition to the rules and basic common sense, standards which were not met.

54. Accordingly, the Tribunal rejects the submission, despite again the strong subjectives, that no penalty should be imposed. There is a need, for the reasons expressed in an illegal substance matter such as cocaine, for a message to be given to other trainers, to the industry at large, the betting public and the community that, when a prohibited substance such as this illegal drug is detected, there must be a loss of the imprimatur of the regulator, and therefore of the Tribunal, on this finding that the privilege of a licence can continue. The blameworthiness, as said, was at the lower end of the scale. The subjective facts are very important. The message, therefore, is a reduced message.

55. The Tribunal has determined, consistent with the gravamen of the penalty guidelines, that a period of disqualification is appropriate. The other penalties, to which the Tribunal might have turned, such as fines and suspensions and the like, are considered, in this Tribunal's opinion, to be not appropriate having regard to a presentation of a class 1 substance such as cocaine.

56. It should be noted as a formality that despite the admission of the breach, the Tribunal is nevertheless satisfied the rule was breached, it was a presentation, it was a prohibited substance. Those matters have never been in dispute.

57. The Tribunal has determined that a period of disqualification of three months is the appropriate term having regard to those findings. The Tribunal cannot find that an application of a starting point of five years, with an appropriate 50 percent reduction which the stewards found to be appropriate to give the two years and six months, is a fair reflection of the failures on this occasion and the message to be given.

58. In determining the starting point, it is quite fairly pointed out today on behalf of the respondent that he did serve seven days of a suspension from 18 April to 24 April. In this case, he was disqualified on 20 September and did not succeed on his stay. Accordingly, the Tribunal determines that that period of three months should commence on 13 September 2017.

59. The severity appeal is upheld.

60. The appellant is disqualified for a period of three months commencing 13 September 2017.

61. At the conclusion of the matter, application is made for the refund of the appeal deposit. The appeal was a severity appeal only at all times. That appeal has been upheld and the penalty reduced. In those circumstances, the appeal deposit is refunded.
