RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR E SELWYN OAM

DECISION

MONDAY 23 JULY 2018

APPELLANT SHANNON WONSON

AUSTRALIAN HARNESS RACING RULE 259 and the APPLICATION of RULE 259A

DECISIONS: 1. Charge 1 dismissed
Charges 2 and 3 confirmed
2. Disqualification of 16 months and 23 days
(8 March 2017 to 31 July 2018)
3. Appeal deposit forfeited

Firstly, the Tribunal wishes to note the passing of Mr Hamish Cockburn, who appeared at the hearing on 24 April, and extends to his family and colleagues its condolences.

This appeal by Shannon Wonson was heard on 24 April 2018 and adjourned to 26 June for submissions and is listed today for a decision.

The appeal has some unusual features and requires some mentioning of the background to it.

At the time the appellant sought leave to file an appeal out of time, he was a disqualified person, with the disqualification set to expire on 8 March 2020, and until he proceeded with the present appeal, he had never put before any controlling body or steward his circumstances. Whilst this occurrence was entirely in his own hands and the respondent had offered him ample opportunity to put his position, he chose not to.

The Tribunal took great heed of the Court of Appeal in the case of Day v Harness Racing New South Wales [2014] NSWCA 423. In Day, the Court stated – and the Tribunal will not be quoting the words verbatim – if a statutory body is able to make an order affecting a man's livelihood, he ought to be heard on the subject.

The Tribunal further took notice of Rule 256 subparagraph 7, which says:

> "Before an offence is found proven, the following conditions shall be satisfied:-
>
> > (a) the offender shall be afforded reasonable opportunity to cross examine witnesses, make submissions, present evidence to the Controlling Body or the Stewards as the case may be;
> >
> > (b) those submissions or evidence shall be taken into account."

And it goes on to a couple of other things, which will not be read out.

The respondent opposed the granting of leave to file out of time, but leave was granted to do so, and any non-compliance with directions was waived to enable the appellant to put his position forward. A stay application was refused on more than one occasion. The respondent's solicitor submitted that the Tribunal had no jurisdiction to deal with an appeal from Rule 259 and relied on the decision in Day and McDowell.

The difficulty with the decision in Day and McDowell for this Tribunal is that the reasons for this decision were not given and so the Tribunal does not know upon what basis that decision was made, and this Tribunal formed the

view that were it not allowable to have an appeal from Rule 259, it could render the whole appeal process nugatory.

In addition to the Court of Appeal matter, the Tribunal finds that under section 17A it has been given wide discretion in a matter like this.

In the Racing Appeals Tribunal Act, section 17A says:

> "(1) The Tribunal may do any of the following in respect of an appeal under section 15A or 15B:
>
> (a) dismiss the appeal,
>
> (b) confirm the decision appealed against or vary the decision by substituting any decision that could have been made by the steward, club … or HRNSW (as the case requires),
>
> (c) make such other order in relation to the disposal of the appeal as the Tribunal thinks fit."

In the Tribunal's view, this gives the Tribunal wide discretion.

The appellant and his supporting team filed, after leave was granted, voluminous written material and raised some novel matters. And in particular, at one stage a request was made that the Tribunal determine the appeal based on the written material so far provided rather than proceed to a hearing. This unorthodox approach was not accepted.

On the day of the hearing of this appeal, the respondent was represented, as I said. The appellant's father, Mr D C Wonson, presented himself and asked if he could appear for the appellant as a McKenzie friend. Mr Wonson Snr informed the Tribunal that in addition to wishing to act as a McKenzie friend, he proposed to give evidence in his son's case. The respondent's solicitor considered this rather unorthodox but did not oppose the situation and the Tribunal formed the view that the appellant lacked the confidence to be without his father's assistance.

At the appeal, the following documents were relied on by the respondent: the Appellant's disciplinary history. Secondly, a 2012 press release. Various correspondences between Harness Racing New South Wales and the appellant. A USB containing video footage. Statements from Mr Prentice, Mr Adams, Ms Ackland and a statement by M Smith, a private inquiry agent. Three documents were marked for identification: a statement by the appellant, a statement by the appellant's father – both of which were dated 12 February 2018 – and a statutory declaration of the applicant's wife dated 11 February 2018.

The Tribunal will later in this decision again refer to one of the letters tendered from the Authority to the appellant.

The appellant relied on the substantial amount of written material already filed prior to the hearing date being set, including a medical certificate relating to his wife. And at the hearing both the appellant and his father gave evidence.

The private inquiry agent gave evidence by telephone from New Zealand and as he was not present, leave was granted for M Smith to file in the Registry his licence or other authorisation, and that was done. It was soon clear that the most vital piece of evidence in the respondent's case was the USB footage and what that footage depicted. Both Mr Prentice and Mr Adams gave evidence as to what they saw in the video. And Ms Ackland's evidence comprised of some observations she had of some horses at the appellant's wife's training facility and at the Young showground, as well as her own observations.

Both Mr Prentice and Mr Adams gave recognition evidence based on their observation of the USB video footage and what they recognised. M Smith gave evidence as to his role in the creation of the video. Both parties acknowledge that this is a de novo hearing and the Tribunal must satisfy itself of the issues raised. And whilst both parties agree that the Tribunal is not bound strictly by the rules of evidence, some investigation of the evidence is needed.

The appellant vigorously, through his father, opposed the admissibility of the recognition evidence and also the tender of the video and submitted that the probative value of this evidence was outweighed by the prejudice it afforded to the appellant.

The position with regard to the law of evidence has long been settled by the higher courts. In jury matters, the presiding judge must give appropriate directions to the jury as to how the jury should approach the identification evidence, what weight it should be given and the need for caution or concern in accepting this evidence.

The appellant called for the video evidence to be rejected because he said it was created contrary to a provision of the Surveillance Devices Act.

With regards to the identification evidence given by Messrs Prentice and Adams, the Tribunal simply has no concerns about the identification evidence that was given because the recognition evidence given by the two men mentioned was given because it was based on their knowledge of the appellant. They both had met him on at least two occasions before the events of 8 and 9 March 2017. And whilst the appellant raised concerns about their opinion, the Tribunal finds that this is not opinion evidence but

recognition evidence which they are perfectly entitled to make based on their knowledge of the person they said they recognised, and that is the appellant, Mr Wonson.

With regards to the challenge to M Smith's evidence, his evidence before the Tribunal via the telephone was clear, that he said that before he undertook the task asked of him, he consulted six maps and at all times during the filming, which was done by a hand-held video recorder, he was not ever on the property of the appellant, Mr Wonson Jnr, or other property, and in fact was always on public property and at one stage on a bush track. The appellant, through his father, raised also issues about a map and the Tribunal is satisfied the video evidence was created satisfactorily and can be admitted.

The probative value, as already mentioned, of these two pieces of evidence is such that high weight must be given to them because the evidence, as the solicitor for the respondent indicated, goes to the very key issues involved in this case, or the core of the matter. Despite the fact that the appellant submits that this evidence is prejudicial to him, the Tribunal finds that its value to its determination is such that its probative value outweighs any prejudice the appellant may feel he has received. So, both pieces of evidence are admitted.

So where does that leave us now with regards to the charges? There are three charges. The first charge reads:

> "The particulars of the charge are that on Wednesday, 8 March 2017, you, Shannon Wonson, as a disqualified person, did enter premises situated at 1/35 Rowley Road, Young NSW, a premises that is used for the purposes of the harness racing industry, and while on those premises you did handle a registered standardbred."

During the course of the hearing, the words for that charge were often described as "leading a horse".

The respondent says that the video evidence shows that the appellant was on the boundary of the house block and the vacant land used by his wife for the purposes of harness harnessing and there, in the company of his son, he in some way engaged, handled, led a horse. The appellant says that he was there at that location simply because he feared for the safety of his son and despite his approach in being cross-examined on that particular point, which the Tribunal found not helpful, the Tribunal finds, that the evidence relating to charge 1 is inconclusive and therefore not made out, and charge 1 is dismissed.

With regards to charges 2 and 3, charge 2 says:

> "The particulars of the charge are that on Thursday, 9 March 2017, you, Mr Shannon Wonson, as a disqualified person, did enter premises situated at 1/35 Rowley Road, Young, a premises that is used for the purposes of the harness racing industry, and while on those premises you did associate with Mrs Christyne Wonson, a person connected with the harness racing industry as a licensed trainer, for purposes relating to that industry."

During the course of the hearing, evidence was adduced that the appellant was the man sitting on the sulky and was handed a whip by a female person.

Charge 3 says:

> "The particulars of the charge are that on Thursday, 9 March 2017, you, Mr Shannon Wonson, as a disqualified person, did drive and train a registered standardbred."

The appellant, his father and his wife all acknowledge that the appellant was at the premises on 8 and 9 March. All three people mentioned say that he was not the person engaged in any way with the horses at those premises because his father's evidence is that he is the man in the red cap sitting on the sulky engaging in training or in some way being engaged with a horse. The man in the red cap sitting on the sulky engaging with the horse in some way is also wearing a sleeveless black vest with camouflage shorts. And there was earlier footage shown from the video evidence of Mr Wonson with two buckets wearing, the respondent says, similar clothes.

The respondent's father, in saying that he was the man sitting on the sulky and engaging with the horse, wearing a red cap, was able to be in that position because his activities in his hometown are such as going to the gym at least four times a week and being a sparring partner in a boxing gym and those activities allow him to maintain physical fitness to enable him to ride a horse and sulky in the manner shown on the video.

The appellant denies that he is the man engaged in any way as shown in the video and further states that the horses shown in the video are ones that he has obtained from the saleyards at Young from a man known to him as Jimmy, and he did so to prevent these horses being sent to the abattoir. The appellant's wife's evidence takes a similar position. But as she was not called, her evidence was by way of a statutory declaration, not much weight can be given to that statutory declaration. The appellant has not been able to produce documentation to confirm the position that he holds that the horses were only ones that were saved from the abattoir. Inferences can be drawn by the Tribunal and the inference drawn by this Tribunal is that the

horses displayed on the video appear to be fit and capable of being involved in the industry and were not on the road to the abattoir.
Mr Prentice and Mr Adams both recognised the appellant as being the person involved in these matters, sitting on a sulky and being handed a whip by a female person, and sitting and driving a sulky in a red cap, sleeveless black vest and camouflage shorts. Messrs Prentice and Adams stated that it was the appellant from their knowledge of him and by way of identification evidence.

Both men, although they could not name the horses that were shown in the video, confirmed that their observations showed that the horses contained some sort of marking or brand which enabled them to be satisfied that the horses were in some way of interest to the harness racing authority as being registered. Ms Ackland similarly stated that she had observed horses, both at the Young showground and at the property where Mrs Wonson carries on her business, as having markings or brands, and even though those markings and brands could not sometimes fully be described or seen, there were sufficient markings to lead to the conclusion that the horses were registered horses.

Mr Wonson Snr further stated in his evidence that Ms Ackland observed him at the property where his daughter-in-law carries on her business and that evidence could be used to support his claim that he was there riding as shown in the video.

The Tribunal accepts the evidence of Messrs Prentice and Adams to establish that the man depicted dealing with the horse in the video by way of receiving a whip and the man depicted in the video as wearing a black sleeveless vest, a red cap, riding a horse and sulky and engaged in training or in some way dealing with the horse, is actually the appellant and not his father. So, the Tribunal has accepted the evidence of Mr Prentice, Mr Adams and Ms Ackland in preference to the evidence of the two Wonson men and Mrs Wonson. So charges 2 and 3 are made out and the conviction is confirmed.

So, now as to penalty. The letter from the Authority to Mr Wonson, the appellant, which the Tribunal referred to earlier, contains a paragraph – and to paraphrase – says that the stewards do not have a discretion in this matter and that the matter if proven and convictions must be recorded. The Tribunal does not accept that notion. In relation to Rule 256(6), this rule says:

> "Although an offence is found proven a conviction need not necessarily be entered or a penalty imposed."

It is the Tribunal's view that that rule allows the stewards to have a discretion. And once they had found that Mr Wonson, the appellant, had

transgressed the rule in 259, it was in their discretion to either record a conviction or not or impose a penalty or not.
This Tribunal will impose a penalty on the convictions recorded in relation to charges 2 and 3 and the penalty that will be imposed will reflect that the circumstances surrounding the charges have a veneer of artificiality because they were committed on a property adjacent to the house block where Mr Wonson and his wife and at least one child, that have been mentioned in the hearing, live. The Tribunal finds that it would require a man of steely determination not to in some way engage or be interested in the activities on the next-door block.

Once a conviction is recorded under Rule 259, that automatically brings into play Rule 259A, which says:

> "In addition to any penalty imposed pursuant to Rule 259(7) the original period of disqualification shall unless otherwise ordered by the Stewards automatically recommence in full."

The Tribunal finds those words "shall unless otherwise ordered by the Stewards" allows or gives to the stewards a discretion that can be exercised, and in this instance the Tribunal will exercise that discretion in favour of the appellant and order that the operation of 259A will not in this instance be applied against the appellant.

Therefore, the only penalty that the appellant will suffer is the penalty that the Tribunal will impose for the breach on 8 and 9 March 2017. So, it is the intention of this Tribunal to impose a penalty that will allow the disqualification period to expire on 31 July this year. So the penalty that is imposed on charges 2 and 3 is a period of disqualification of 16 months and 23 days, to date from 8 March 2017 and due to expire on 31 July 2018. The Tribunal has stated its intention clearly because, in case the maths are not quite on the spot, it is the intention of this Tribunal that the period of disqualification that Mr Wonson, the appellant, is subject to will expire at the end of this month.

In relation to the deposit, the order is that it is forfeited.
