# RACING APPEALS TRIBUNAL NEW SOUTH WALES

## TRIBUNAL MR DB ARMATI

# EX TEMPORE DECISION

# WEDNESDAY 8 AUGUST 2018

## APPELLANT DAMIAN DAVIS

## AUSTRALIAN HARNESS RACING RULE 239A

## SEVERITY APPEAL

**DECISION:**

1. **Appeal upheld**
2. **Disqualification of 4 months from 2 May 2018**
3. **Appeal deposit refunded**

1. The appellant appeals against a decision of the stewards of Harness Racing NSW to impose upon him a period of disqualification of 12 months for a breach of AHRR 239A. It provides:

> "A person whose conduct or negligence has led or could lead to a breach of the rules is guilty of an offence."

It was particularised as follows:

> "You, Mr Damian Davis, did on 22 February 2017 use a $20 note to self-administer cocaine and later handed that $20 note to licensed trainer Mr Nathan Turnbull at the Dubbo harness meeting prior to you and Mr Turnbull handling and leading registered standardbreds engaged to race at that meeting. Subsequent to that conduct and/or negligence, the registered standardbred Destiny Warrior returned a positive sample to benzoylecgonine and ecgonine methyl ester, metabolites of cocaine."

2. The stewards did not conduct a formal inquiry but dealt with the matter on the papers. That was a right that the appellant had and he is not to be criticised because he did not elect to have a hearing.

3. When confronted with the matters originally, he had admitted his breach. When confronted with the formal allegation of breach, he entered what was then described as a plea of not guilty. An adverse finding was made. He was invited to make submissions on penalty. He did so, and the penalty was imposed. He subsequently appealed by his notice of appeal, which is dated 4 May 2018. He sought to enter a plea of not guilty to the Tribunal. Subsequently, he has admitted the breach of the rule. This matter has been dealt with, therefore, on a severity basis only.

4. The penalties available for this breach are those provided in the general penalty provisions in the rules. There is no penalty guideline which covers this conduct. In addition, no precedent cases have been handed to the Tribunal which might be used as a method of guidance on what might elsewhere be described as a parity principle.

5. The Tribunal adopts, but does not repeat, its usual mantra that these are civil disciplinary proceedings. The function is not to punish but to make a protective order in the interests of the integrity of the industry and to provide that in that particular order a specific message is sent to this individual person and to the industry at large, and including the public, whether racing or non-racing members of the public, that aspects of integrity and the welfare of the horse will be maintained at the highest levels.

6. The evidence has comprised a bundle of material, which is the interviews with the appellant, which were conducted by stewards and investigators in

April 2017, the evidence that was taken at an inquiry involving the licensed trainer Nathan Turnbull, referred to in the particulars, and in particular Mr Davis' evidence at that inquiry, together with the decision involving an appeal by Mr Turnbull to this Tribunal and then a series of correspondence that related to the stewards' inquiry and subsequently. In addition, Mr Davis, the father of the appellant, has given evidence and the appellant has put in evidence a number of documents relating to treatment received by him, and character references.

7. The appellant had previously been licensed as a trainer but at the time of this conduct was not licensed. He was working for his father in a furniture removal business. He was a friend of Mr Nathan Turnbull of long-standing. He had a cocaine addiction. There was an issue whether he had had it for 20 years or 6 years. The evidence is unambiguous: it was for 6 years.

8. In the course of questioning by the stewards, he had made reference to the fact that he had suffered from another disability for which he was receiving treatment and in the course of some ambiguous questioning and answering he referred to the fact that he had undertaken that type of treatment regime for some 20 years. In the course of referring to that treatment regime, he made passing reference to the fact that when he was not at his best because of that other disability, he would resort to cocaine. However, his clear and positive evidence elsewhere in the course of questioning was that he had had the cocaine habit since 2011, a period then of 6 years, and he described how he had been to Thailand, acquired the habit and continued with it.

9. It was a substantial habit. He described himself as something of a party boy in various statements he has made in the matter. And it is quite apparent that the status of his party boy behaviour was well known to Mr Nathan Turnbull on the findings previously made against Mr Turnbull. And well known to others. Importantly, as a previously licensed person and as a person associating with harness racing and other sporting codes and as a person who assisted Mr Turnbull in unloading horses, he said this in the transcript of interview of 20 April 2017:

> "A. It always worried me and it bloody happened."
> "Q. And you didn't think of it on the night?"
> "A. No, I didn't, no."

10. The point of that piece of evidence is a knowledge in the appellant here that his cocaine habit, by reason of his knowledge and experience, could well have occasioned something to happen. It did.

11. The particulars of the breach alleged against him raised both of the two scenarios considered in the Turnbull appeal. The first scenario was that the contamination was caused by Mr Turnbull handling a $20 note from which

the appellant had previously snorted cocaine, and handing that note through the hands of Mr Turnbull to a gate attendant and Mr Turnbull subsequently handling the horse. Or, alternatively, it was by reason of the fact that the appellant handled the horse – or a horse – and horses on the night, and their gear, and possibly a contamination had occurred there.

12. In the Turnbull decision it was not necessary to make that final determination because of the how, when, why and wherefore issue. In respect of this appellant, because of an admission of the breach, those matters are available.

13. What is required, however, is a focus upon objective seriousness. What was the level of negligence in those circumstances embarked upon by this appellant which warrants a determination of a penalty?

14. An opening remark is that in the submissions for the appellant, consistent with the submissions for the respondent, a period of disqualification is not opposed. Therefore, the other types of penalties which might be considered are not further deliberated upon.

15. The aspect of his conduct can be said, in view of the fact of his past experience and his knowledge that something might have happened, to have been at a level which warrants censure. However, he did not engage in an aspect of deliberate disregard which might, whilst there are no degrees of negligence, be said to be of a higher order of disapproval. The anticipation likely by the handling of the $20 note, the time that had elapsed since the cocaine was consumed and the circumstances in which it was consumed would lead to the brief handling of the subject horse but to have not, perhaps, enlivened in many people's minds that by that act of negligence the prospects of passing on a cocaine substance to the gear of the horse he handled would be uppermost in his mind. It was not wilful blindness, it was a simple failure of the application of principles of common sense at a level which is consistent with his admission of the breach of negligence.

16. In assessing the objective seriousness of the conduct, therefore, it must be considered at a lower level. Unguided by any aspects of parity or penalty guidelines, it is a difficult exercise to assess where that conduct should leave a starting point for penalty against which other matters are considered. The Tribunal will return to that.

17. In respect of his subjective circumstances, little was given to the stewards in the submissions he made. The appellant has not given evidence to this Tribunal. Therefore, any assessment of him must be based upon his written documentation and that which others have said about him. The respondent criticises the appellant very strongly for not having put

himself forward to indicate rehabilitation and what likely lessons he has learnt such that any protective order that is required may be diminished.

18. The appellant appears to be somewhere about 40 years of age. As has been said, he was previously a licensed trainer but is no longer so. He has worked in his father's removals business for many, many years. He was earlier, after completing Year 12, a green-keeper for a considerable number of years, having completed an apprenticeship there.

19. The appellant having denied up until the time of the consideration of the lodging of evidence on his appeal, he having denied a breach right up to that point, has not, it is submitted, on any particular points identified in his favour, expressed a direct aspect of contrition. There is no doubt that throughout his interviews he admitted that he was the source and nobody else and he has expressed that he regrets that his conduct occurred which caused Mr Turnbull the breach for which he, Mr Turnbull, received a three-month disqualification on appeal. The suggestion that he has had no expressions of remorse, therefore, is not accepted. Again, it would have been helpful if he had expressed those sentiments himself to the Tribunal, but for reasons unknown he has not.

20. Because he has made an admission on appeal after that history of denial, he is not entitled to a full 25 percent discount which this Tribunal has expressed is appropriate for an early admission of breach and cooperation with the stewards. The Tribunal is satisfied he cooperated with the stewards. He voluntarily participated in three records of interview and voluntarily attended the Turnbull stewards' inquiry. As to his admission of the breach, as has been said, he retracted his initial acceptance of wrongdoing, denied the breach to the stewards, maintained that denial on penalty, maintained it on his lodging of his appeal but now admits it. He will be given a 10 percent discount.

21. As to his other personal circumstances, he finds comfort in the various references tendered on his behalf. His father has spoken on his behalf and the respondent suggests little weight should be given to a father's reference. However, it does contain a number of factual matters which essentially have not been challenged. Namely, that he says he has changed his life from a person who was out of control. He voluntarily went to rehabilitation at his father's request in Thailand. It was paid for by his father, but nothing turns up on that. His father said that he has kicked the habit. He said that in his reference, which is undated, and he said it on oath before the Tribunal today. He says that he would know if his son was consuming cocaine at present because he would not be putting on weight as he is now, he would emit a particular form of body odour, which he does not, and his behaviour has changed from being "off the planet" by reason that he has no longer displayed bad habits, a failure to listen or particularly aggressive forms of anger.

22. There is comfort in his father's conclusions, despite the appellant not telling the Tribunal that himself, by reason of the other character references, to which the Tribunal will return, and the medical evidence which has been put forward on his behalf. In particular, it demonstrates that as of 13 June 2018 he was producing negative tests through a pathology laboratory for cocaine metabolites. In addition, Dr McRae, treating practitioner of Orange, says on 25 June 2018 that he is of the opinion that the appellant is now mentally well and is not using cocaine. He is now not using narcotics. And for that purpose he had had urine testing performed which had been clear. He attended a rehabilitation clinic in Thailand and was accompanied by his father. His father says that he successfully completed that. He had been to a community facility and was discharged on 4 July 2017. And there was a reference to various disabilities to which he was then suffering, to which Dr McRae says are no longer a problem for him.

23. The other references are from Dr Gynther of 4 June 2018. He first saw him in February and attended to him for psychiatric appointments for a series of disabilities. He describes him as having improved mood, successful reduction in one of his disabilities and, importantly, "to my knowledge, he has not used cocaine since he attended rehabilitation in 2017".

24. Next is a reference by Stephen Hamilton of 2 August 2018. Known him for 30 years and finds him to be a happy, caring person with strong work ethics. He has turned his life around after having reached out to Mr Hamilton for help and advice, which advice he took. He identifies the remorse that the appellant has for what he did and expresses that the appellant has said to him that he realises and admits complete fault in this matter. He has therefore expressed to others, in addition to that which he said in various interviews, expressions of remorse. He says how he has now worked very hard to remove himself from his previous life, remains drug-free and has a sparkle again.

25. Next is by Elizabeth Seaman of Ray White Orange of 30 July 2018. Known him professionally, and his family, and aware of his addiction to cocaine and aware of his disqualification and refers to the concerted effort he has been making to improve his lifestyle, undertaking therapy and detoxification. She says to the best of her knowledge he is no longer using cocaine and avoids people with whom he might associate who use cocaine. She describes the well-regarded family from which he comes, his love of horses, and the fact that they provide him with a focus to stay away from cocaine and to strive to become a better person. She describes how he has made an improvement in his life.

26. Next is by John O'Shea, well-known racing identity, of 19 June 2018, who wishes to offer him employment, once he is able to be registered, as a permanent full-time stablehand.

27. The last is by Darrel Rosser of Colour City Money Solutions Pty Ltd of Orange, 19 June 2018. Known him for 15 years personally and socially. Finds him to be a sincere and mature young man, loyal and willing worker and highly regarded by his friends and workmates, with strong family ties, a person who has always set himself very high standards in everything he undertakes. A reference to being a keen golfer is made, but the conclusion to be drawn from that is uncertain. He is aware of why this reference has been sought and feels the appellant's actions were totally out of character. The appellant has expressed extreme remorse to Mr Rosser who refers to his rehabilitation and the fact he will not reoffend.

28. Those matters, coupled with the evidence of Mr Davis, enable the Tribunal to conclude that at the present time, despite the appellant's failure to give evidence, it can be comfortably satisfied that as of today he is no longer taking cocaine. As to whether he remains addicted to it cannot be determined. The Tribunal is satisfied from that evidence that he has expressed remorse for his conduct and regret for its consequences. That he has turned his life around. That he is now in a position to take a place in society, at present uninfluenced by drugs such as cocaine, and that he has an insight into what he did as being wrong and that it will not be repeated.

29. There are those in the industry –Mr O'Shea – who is prepared to support him in the future, although consistent with the submissions, Mr O'Shea's references are limited in what he has been told because he has not expressed it in any great detail.

30. Therefore, the submission for the respondent that he is not fully rehabilitated cannot be accepted.

31. The appellant has been dealt with in the criminal law system for unrelated matters and has just completed a suspended sentence. The details do not need to be set out. The respondent disqualified him for that conduct for 3 months and that period has just expired.

32. What then of the message to be given to him? What then of the protective order that is required? It might also be said in respect of looking at a protective order that he is not currently a licensed person. He was not at the time a licensed person. Therefore, the need for a protective order diminishes. So far as a message to him is concerned, the Tribunal is satisfied he has received it. It is satisfied that the appropriate penalty of a protective nature on an integrity assessment is very much reduced by that fact. It, however, does remain that on a message to others in the industry, or those associated with it, or those who look at it, there must be an aspect of

protection provided to ensure that a message is given to licensed or unlicensed persons that they must engage in conduct which cannot lead to these types of consequences and they must be more informed and more astute as to what likely consequences will flow when they engage in the type of negligence found here.

33. In that regard, it not being submitted that a penalty other than disqualification is appropriate, it is necessary to have regard to it. The Tribunal finds little comfort in the fact that, for the reasons expressed in detail in the Nathan Turnbull penalty decision, an analogy of the 3 months there imposed is appropriate. In particular, the reason for that is this: that it was this appellant’s conduct which occasioned a failure by Mr Turnbull. It is, therefore, that it is in fact a more serious matter than that in which the Tribunal eventually determined penalty for Mr Turnbull, bearing in mind the different facts and subjective circumstances in the Turnbull matter as compared to the facts and circumstances here.

34. For that reason, the Tribunal considers that a period of disqualification of 3 months does not provide an appropriate and salutary protective message to the community at large and other people, in particular licensed people.

35. The Tribunal is not of the opinion that the 12 months that the stewards considered to be appropriate is the necessary order having regard to both the facts and the subjective circumstances, particularly having regard to the fact that since the stewards made their determination there have been dramatic changes in the life of the appellant and he is entitled to have those changes taken into account. As was said in Frisby (1 April 2016) as to different facts and circumstances available to this Tribunal compared to the stewards.

36. A starting point of 6 months is determined.

37. From that 6 month period there will be a 10% reduction for the admission and 23% for the subjective facts. That is a discount of 33% which is 2 months

38. The Tribunal has determined that a period of disqualification of 4 months is appropriate.

39. The appeal on severity is upheld.

40. There has been no stay in this matter.

41. The order, therefore, is that that period of disqualification of 4 months will commence on 2 May 2018.

SUBMISSIONS MADE IN RESPECT OF APPEAL DEPOSIT

42. The decision the Tribunal has to make is whether the appeal deposit should be refunded, forfeited or something in between. It was a severity appeal. At the end of the day, the matter was prepared on that basis. It has been successful. Whilst a penalty has been imposed, it is a substantially reduced penalty.

43. The appeal deposit is ordered to be refunded.

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