RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI
ASSESSOR MR W ELLIS

EX TEMPORE DECISION

WEDNESDAY 10 JUNE 2020

APPELLANT MALCOLM DIEBERT

AUSTRALIAN HARNESS RACING RULE 168(1)(e)

DECISION:

1. Appeal dismissed
2. Penalty of 8 weeks' suspension of licence imposed

1. The appellant, licensed driver Mr Diebert, appeals against the decision of the stewards of 12 April 2020 to impose upon him a period of suspension of his licence to drive for a period of eight weeks for a breach of Rule 168(1)(e).

2. The stewards set that part of the rule out as follows:

> "A person shall not before, during or after a race drive in a manner which is in the opinion of the Stewards improper."

The stewards particularised that as being this:

> "In race 1 today as the driver of Reddel stewards feel that near the 100 metres you have made an improper action in that you have shifted your runner in – shifted that filly in not to stop your runner from shifting out but to stop Mr White on Menames Needy from improving to your inside in an endeavour to win the race. As a result, Menames Needy has been checked and taken down on to Mr Druitt's horse Floorless, which was inconvenienced when those two runners banged wheels."

3. The appellant pleaded not guilty to the stewards when confronted with that charge and those particulars and has maintained on appeal that he did not breach the rule.

4. The evidence has comprised the transcript and race day footage before the stewards, together with the oral evidence of the Chairman of Stewards at the race meeting, Mr Quick, the appellant himself, and oral evidence of licensed drivers Mr Harpley and evidence of licensed driver Mr Druitt. In addition, the written letters of Mr Harpley and Mr Druitt were put in evidence. The last piece of evidence, upon which nothing has turned, was the stewards' report.

5. The issue for determinatio is whether the appellant drove improperly. The participants have been named in the particulars. The race was reaching the final turn, it was at Wagga, a wide track. It has a sprint lane. As the horses and drivers approached the 100 metre mark the incident in question is said to have taken place. In examining the facts, there are two matters to be considered.

6. The first is the case for the respondent, the regulator Harness Racing NSW, that the actions of the appellant were to drive his horse down into a gap which they say had opened up permitting Mr White to drive through that gap between the horses driven by the appellant and Mr Druitt. As a result of the appellant's actions, it is said that he deliberately drove his horse down into Mr White's horse and forced that into Mr Druitt's horse.

7. The second is that the appellant has put forward a case which essentially is that Mr White should not have gone through the gap which he sought to take. In doing so, the offside hind leg of Mr White's horse has contacted the gig wheel of Mr Diebert's horse, as a result of which Mr Diebert took an immediate reaction of a safety nature to keep himself in the gig, and then within a fraction of a second of taking that action, he straightened his horse up and it ran through to the winning line.

8. Those are the two issues that have to be separated.

9. The case for the stewards is that each of the horses driven by Mr Druitt and the appellant were proceeding in straight lines and Mr White's horse was driven from behind Mr Druitt's horse towards what was initially no gap. Mr White's horse was proceeding faster than the others. Mr Druitt was of the opinion that he could drive in a straight line and win the race. Mr White has not given evidence; he was unfit to give evidence. He did tell the stewards his version. And the version he gave was that he believed a sufficient gap opened up and it is, in rules of racing, that if a gap does open up that that driver, Mr White, was entitled to take it and he could not be obstructed, as it were, in respect of his taking of that gap. Mr White told the stewards at their inquiry that he gave his horse a proper opportunity by taking a gap that was then there for him. The stewards in their inquiry conceded, and Mr Quick on this appeal agrees, that initially there was no gap. It is the evidence of the appellant that that gap did not ever open up. It was the evidence of Mr Druitt in his written evidence that there was no gap.

10. But Mr Druitt, at the hearing, when confronted with his vision of the first time of the head-on, conceded that for one or two strides a gap did open up. It is the evidence of the stewards that that gap that did open was sufficient to enable Mr White to drive through it, that his horse was observed to have its head turned downwards towards the marker pegs in an endeavour to be driven into that gap. There is no doubt that having gone through the gap as the stewards described it, or into a space where there was no gap, as the appellant wished to have it established, was then in contact with Mr Diebert's cart gig to gig. The impact then forced Mr White down onto Mr Druitt and each of them was partially inconvenienced.

11. At the outset it is necessary for the Tribunal to state that Mr White is not subject to any charge with which the Tribunal is dealing. It is strongly the opinion of Mr Druitt and the appellant, supported by Mr Harpley, that Mr White should not have taken the drive through the gap as it was.

12. The video images support the evidence of Mr Quick and support the opinion formed by the stewards at the inquiry that a gap did open up. It was a very brief gap. It was closed as a result of the actions just described very quickly. But it was there. As to whether Mr White should or should not have taken it does not become the issue for this Tribunal to determine. The issue

is whether, when Mr White sought to take that gap as he believed it to be and which the stewards consider was available for a very short moment, that the actions of the appellant were to close that gap, as is the stewards case, or there was simply a reaction and the gap was closed as a result of that reaction.

13. The appellant does not have to prove anything. The stewards have to prove this case to the Briginshaw standard. That is, leave the Tribunal with comfortable satisfaction that the case they seek to mount is established.

14. The video images, which were so troubling to the stewards, are equally troubling to the Tribunal. It is quite apparent – and the appellant does not deny it – that he leaned quite substantially to his inside, that is, towards Mr White's horse. The evidence establishes that his left elbow came up, bringing with it his left arm and creating pressure on the left rein, such that at that very moment Mr Diebert's horse was directed down towards Mr White's horse. Immediately after that movement down, and within a second, Mr Diebert pulled the right rein and his horse was moved away.

15. The case for the stewards is that the actions of Mr Diebert were deliberate and that they were designed to close the gap and prevent Mr White from having the run through it. There is no doubt that the gap did partially close but reopened once Mr Druitt's horse went further down the track and Mr Diebert's horse was pulled out of the line of Mr White's horse.

16. At the stewards' inquiry the appellant was at considerable pains, and on numerous occasions, keen to establish that all he was doing was maintaining a straight line. He refers to an impact which was a striking of the gig at a time when he was trying to keep a straight line. But then when further questioned about that statement of a gig impact, he recanted from that and just said that the horse "I just say is coming up the inside of me".

17. The appellant at no time said to the stewards that his actions in leaning to the left and in raising his left elbow, and therefore lifting his arm and pulling on the left rein, were because of a reaction for safety purposes. That reaction, he said, was necessary because he felt his gig impacted, which caused the gig to fractionally come off the ground. It is uncontested evidence that one of the means by which a driver can prevent dislodgement from a gig is to do that which the appellant says he did, that is, to lean towards the point of impact of the gig wheel, and possibly also in a balancing exercise, to raise an arm. But did the appellant do that on this occasion because of that reaction?

18. Firstly, he said nothing about it to the stewards. The first occasion on which he identified it in any satisfactory way, there being no evidence of his discussion the day after this incident with the Chairman of Stewards Mr Adams, was in his grounds of appeal. His grounds of appeal set out in

considerable detail what he says was the course of action that he undertook, namely, that which has just been summarised, that he took an instant reaction for safety purposes and that he immediately corrected, within a second, that movement to the left by pulling on the right rein.

19. The appellants's case that that case has in it matters which are, to the Tribunal, of concern.

20. Firstly, that the feeling of the impact and the gig fractionally come off the ground are not supported by the video evidence. But there is of course no other evidence, Mr White not having been questioned about that before the stewards as to whether there was an impact with his horse.

21. The sense that the appellant had of the impact was a feeling of it. In essence, not greatly described, there was, for example, no loud bang of a leg striking a gig, and the gig was only fractionally off the ground. As said, that is not established on the video evidence.

22. The other point of the evidence is this: the appellant has sought to establish that that occurred, and thus his reaction, by reason of the fact that the offside hind leg of Mr White's horse was the point of contact with the appellant's gig. The problem again becomes that he did not tell the stewards that. But not only that, but a viewing of the race day footage does not support it. The Tribunal acknowledges the caution with which race day footage needs to be viewed, and that is because the angles of the camera can lead to a deceptive conclusion about the precise location of each of the necessary things being examined, that is, horses' legs, wheel positions, head positions, horses' head positions and the like. They can be deceptively tricky in discernment.

23. What the evidence does show is that when Mr White came out from behind Mr Druitt's horse that the offside wheel of his gig clearly moved on a line inside the running line of the nearside wheel of the appellant's gig. That is, it was further up the track than the inside wheel of the appellant's. It was described as eight inches, a rather quaint form of measurement since 1968, taken to be about ten centimetres, or thereabouts, it is assumed, and it was therefore necessary for Mr White to come down the track.

24. But the problem is that the video images do not show that the hind leg on the offside of Mr White's horse could at any time have been sufficiently forward that at the time when on the video the appellant seeks to establish the contact occurred it could possibly have been that. He did not advance a case it was the forelegs of the horse. The video image shows there was some proximity of the forelegs to the wheel. But again that is not able to be clearly discerned on the limited slow-motion replays available to the parties and the Tribunal.

25. The effect of that is this, that the facts that go to establish the reaction are not discernible by reason of any evidence corroborative of the appellant. It is emphasised he does not have to prove his case, it is to be established by the respondent that its case must be accepted. But there must be, at the end of the day, comfortable satisfaction that the contact which he described occurred.

26. And there is one other factor which is apparent and that is that there was nothing about the running line nor the running gait of Mr White's horse at that leg point of impact, rather than fractionally later, which gives any support for such a contact, for example, Mr White's horse did not go off-stride in any way, its legs were not, apparently – and we are only asked to focus on the hind leg – is not depicted as having been put off its normal stride.

27. In essence, therefore, troubled as the Tribunal has deeply been by the failure of the appellant to put any of these matters to the stewards, that when he comes to try and establish it by his evidence that he leaves too many gaps to find any way that his story, as he has sought to advance it, can have the credibility that he wants.

28. The effect of that conclusion is that the respondent, the regulator, through its witness Mr Quick with all of his experience of some 11 years as a harness racing steward, satisfies the Tribunal that it should not accept the appellant's version.

29. It is, therefore, necessary to examine what is left and that is that the appellant has moved down, he shifted his body to the left, the effect of it is to further inconvenience the drive of Mr White. And again it is not the case of determining whether Mr White should be going through that gap or not; his horse was there. It is, of course, that the respondent also satisfies the Tribunal that there was no reason, if it was a reaction matter to take a horse away from a danger, that that horse would be moved downwards, to its inside, to be a necessary response to a danger on the nearside. That may be occasioned if the appellant had been able to establish the event as he wished it to be establish if it was perhaps a natural reaction to his shift in the gig.

30. At the end of the day, the respondent satisfies the Tribunal that its case should be accepted. The effect of that is the Tribunal is satisfied that the appellant moved his horse down into Mr White's line, that the fashion in which he did it by the shift that he engaged in, was not a proper action.

31. As to the meaning of improper in the rule, it has not been advanced on the basis that it has anything other than an obvious meaning in relation to that action and its circumstances and its effect, and the matter therefore is

one in which the Tribunal is satisfied that the appellant has breached the rule as particularised against him.

32. The appeal on the breach of the rule is dismissed.

SUBMISSIONS MADE IN RELATION TO PENALTY

33. The issue now is what penalty should be imposed. There has been no submission made that the guidelines should not be considered. They provide, as the Tribunal has said on many occasions, an element of certainty for licensed people as well as the regulator as to what likely consequences will follow.

34. In respect of this matter, a case of improper, which is what is found, the Tribunal acknowledges in its reasons for decision on the breach that it talked of aspects of impeding but then it is not suggesting by those remarks that a lesser type of breach has occurred.

35. The starting point is 26 weeks. The stewards considered that should be reduced to 12. They have generously done so for a number of reasons; they perhaps did not articulate those in any great detail. But the aspect of improper in this case is one which is tempered, as the appellant has said, by the fact that immediately after his first reaction, which was the one found against him, he did strongly correct the line of the horse from a movement down by pulling on the right rein and taking it out of that danger potential. It is that the stewards were concerned by potential danger in looking to certain penalties, and that was certainly there, not only for Mr White and whether or not he has put himself in that position or not does not have to be decided. And also, of course, for Mr Druitt, who was also impacted as a result of the combination of the driving of the appellant and Mr White.

36. The Tribunal is of the opinion that the stewards very fairly approached the issue of penalty. The submissions for the appellant on the issue of penalty are not strongly put in respect of anything less.

37. A reduction was given for his driving record. That is within the terms of the guidelines. The Tribunal considers that to be appropriate. The starting point having been reduced to an appropriate level, there were no other reasons for deductions. The Tribunal itself agrees with the determination of the stewards in forming its own opinion that a period of suspension of eight weeks is appropriate.

38. The appeal against severity is dismissed.

39. The timings of that, having regard to the deferral of the commencement by the stewards for nine days, coupled with a short period of time before

there was a stay, is a matter for the regulator and the appellant to work out. In the circumstances, that eight weeks starting point will not be specified.
