APPEAL – 695

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT:	**BRYCE MCINTOSH**
APPLICATION NO:	**A30/08/695**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING:	**4 December 2008**
DATE OF DETERMINATION:	**6 March 2009**

IN THE MATTER OF an appeal by Bryce McIntosh against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 20 August 2008 imposing a disqualification of eight months for breach of Rule 190(2) of the Rules of Harness Racing.

The Appellant appeared in person.

Mr C Coady appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

INTRODUCTION

This is an appeal against penalty.

On 20 August 2008, the Racing and Wagering Western Australia Stewards of Harness Racing disqualified the Appellant for eight months for a breach of Rule 190(2) of the Rules of Harness Racing.

The relevant parts of Rule 190 are in the following terms:

> "190. Presentation free of prohibited substances
>
> (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.
>
> .....

BACKGROUND FACTS

The Appellant was the trainer of ZULUSHAR, which was presented to race at Kalgoorlie in Race 4 the Piccadilly Hotel Handicap on Friday August 1 2008. ZULUSHAR was presented for a pre-race blood test. The sample was analysed at the Racing Chemistry Laboratory (WA), and was reported to contain TCO2 at a level greater than 36mmoles/L. The actual level was 37.7, with a measurement uncertainty of 1.0. Confirmatory analysis was then undertaken by Racing Analytical Services in Victoria, and the level above 36 was confirmed. The actual level detected there was 38.6, again with a measurement uncertainty of 1.0. Because of the results, the Stewards opened an inquiry. There was a hearing on 20 August 2008. The certificates of analysis were presented as evidence. Pursuant to Rule 191(2), these two certificates amounted to conclusive evidence of the presence of a prohibited substance. It was on this evidence that the Appellant was found guilty.

THE RULES

TCO2 levels can be evidence that a prohibited substance is present, or has been administered. TCO2 levels can also be evidence that a horse has that TCO2 level naturally, and thus provide no evidence of administration.

When a TCO2 level is reported above 36mmoles/L, at least two potential offences arise for investigation by the Stewards. There is the possibility of an offence against Rule 190(2), which is what occurred in this case. That is what is commonly called a "presentation offence". There is also the possibility of an "administration offence" under Rule196A. Rule 196A is in the following terms:

"196A. Administering substances

(1) A person shall not administer or cause to be administered to a horse any prohibited substance

(i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race; or

(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

(2) A person who fails to comply with sub-rule (1) is guilty of an offence.

THE DIFFERENT POSITIONS OF THE PARTIES

It is generally accepted that an administration offence is more serious than a presentation offence. These types of administration offences inevitably involve deliberateness, and often a degree of subterfuge. Presentation offences often involve miscalculation, and no deliberateness. In this case, the Stewards made no allegation of an administration offence. They did not charge the Appellant with an administration offence, and did not penalise him on that basis. At no stage was it alleged that he "drenched" the horse. Despite that, the Appellant presented his case at the Stewards inquiry and at the Appeal before us on the basis that he did not commit an administration offence, and because of that fact he is deserving of a lesser penalty for the presentation offence.

The Appellant put two inconsistent propositions to the Stewards at the hearing. He admitted to the Stewards that he was guilty of the presentation offence as alleged, yet maintained that he was not guilty by virtue of his argument that the elevated level came about by matters beyond his control. At the Appeal he maintained the same two inconsistent propositions, namely that he was guilty of the presentation offence, but that he was that he was not guilty for the same reasons. His position is best expressed in his own words, as part of his written submission to the Stewards. He said:

"I had an honest and reasonable but mistaken belief that I had not contravened any rules or regulations".

The reason behind the Appellant's alleged mistake is again best expressed by him, in his ground of appeal number 5. It is in the following terms:

"The level of TCO2 can be caused by other factors than the Illegal dose of bicarbonate"

In this case, the Appellant sought to prove that ZULUSHAR had a naturally occurring level of TCO2 higher than normal, and that this was the beginning factor which together with others led to the horse being found to have a level higher than that allowed by the Rules.

There is no defence to a presentation offence. An honest and reasonable but mistaken belief is not a defence. Rule 190 creates an absolute offence. The certificates together amount to conclusive evidence of the presence of a prohibited substance. Rule 188A, which sets out the evidentiary presumption, contains no exceptions for horses which have high base levels. There is nothing to be found anywhere else in the Rules which would provide an exception, or in legal terms a "defence". That may mean that any horse with a naturally occurring high level will never be safe from a potential breach of the Rules. However, that is a matter for Stewards in the exercise of their discretion to prosecute, or for the Rules. The Tribunal on appeal cannot make the Rules or interfere with the discretion to prosecute.

RESOLVING THE DIFFERENT POSITIONS

Rules 188A (1) and 188A (2) (a) are written on the basis that no horse has a naturally occurring TCO2 level greater than 36. The evidentiary presumption, written into Rule 188A (2) (a) is that anything over 36 is evidence that an alkalinising agent has been administered or is present. Dr Medd, Consultant Veterinarian to Racing and Wagering WA (RWWA), gave evidence at the Stewards' inquiry. She said that the average (naturally occurring) TCO2 level for a horse is 30.7mmoles/L. (T11). The Appellant caused ZULUSHAR to be tested prior to racing on 8 August, which was a week after the race in question. His laboratory reported to him a level of 35mmoles/L, which is significantly higher than the average spoken of in evidence by Dr Medd. The Appellant was concerned and immediately withdrew ZULUSHAR from that race (T8). The Appellant relied on this evidence of ZULUSHAR having a naturally occurring level higher than normal. He submitted it as a beginning point fo r his other evidence that his normal feeding regime and other factors beyond his control had been sufficient to take the horse above 36mmoles/L on the day in question. At T13 – T15, Dr Medd cast doubt on the alleged naturally occurring level of 35mmoles/L, and also went on to say that several hundred grams of alkalinising agent would have been needed to achieve the level found.

The Stewards did not resolve the factual dispute for the purpose of determining guilt. That is because the Appellant pleaded guilty, and because there is no defence to a presentation offence. The Stewards therefore had no need to determine the dispute in order to determine guilt. They charged the Appellant with a presentation offence against Rule 190(2). The particulars and plea are as follows: (T18)

Chairman: "The Rules of Racing states a horse shall be presented for a race free of prohibited substances. 190 part two goes on to say that if a horse is presented for a race, otherwise than in accordance with sub rule one, the trainer is guilty of an offence. As a result the Stewards do feel you do have a charge to answer under Rule 190 part two, the particulars being that, as a trainer you produced ZULUSHAR to race at Kalgoorlie on the 1st of August 2008 in Race 4 the Piccadilly Hotel Handicap, with aTCO2 level in excess of 36 millimoles per litre. Do you understand the rule and the charge?

B McIntosh: Yes I do.

Chairman: Okay, do you wish to plead to the charge?

B McIntosh: I plead guilty.

The Stewards also did not resolve the factual dispute for the purpose of determining penalty. Their decision on penalty contains no reference to the disputed matters of fact, namely whether ZULUSHAR had a higher than normal naturally occurring level and whether accidental factors could have taken it above the accepted level. In my opinion, it would have been better that the Stewards determined that disputed matter of fact for the purposes of penalty. It was entirely possible that the Appellant did in fact have the mistaken belief that ZULUSHAR'S level was acceptable at the time of presentation. Although such a mistake, if found, was not a defence, it was relevant to penalty. The Appellant's level of culpability would for example depend upon whether he was reckless or just simply mistaken. However, it was not alleged by the Stewards at the appeal before us that the Appellant acted recklessly or with indifference, and thus there is no need to determine the dispute here. The end result is that the Appellant is entitled to be dealt with on the version of facts most favourable to him. He was mistaken as to ZULUSHAR'S level.

THE POSITION ON APPEAL

As noted above, on the Appeal the Appellant continued to maintain his position that he was guilty of the presentation offence, but was also not guilty of it because of his honest and reasonable but mistaken belief. That is no defence to a presentation offence, and the Appellant was not charged with or found guilty of an administration offence. However, I would accept his submissions as being that the presentation offence should have been characterised as inadvertent, rather than something more serious such as reckless or indifferent.

DETERMINING THE APPEAL

The grounds of appeal are as follows:

1. Personal circumstances.
2. The forthright manner in which I approached the matter.
3. My guilty plea.
4. Previous cases. Stewards gave considerable weight to a previous conviction this offence being over 15 years prior.
5. The level of TCO2 can be caused by other factors than the illegal dose of bicarbonate.

The Stewards' reasons on imposing the penalty were as follows: (T21 – T22)

> *"Thank you gentlemen, take a seat. Mr McIntosh, we've given careful consideration to your submissions that you've made here today. The controlling body has maintained a policy of racing free of prohibited substances for a considerable period of time. The seriousness with, which this issued (sic) is viewed can gauged by the amount of space that is devoted to matter relating to prohibited substances in the Industry Magazine. This is done in an effort to fully inform industry participants of the considerable obligation that is placed on them to ensure that horse (sic) are presented to race free of prohibited substances. The industry is reliant on the level of support it receives from the racing public to ensure its ongoing success, that support is dependent on the integrity of the industry as a whole and the integrity of its individual participants. Any undermining of that support through a loss (sic) confidence could have serious consequences. It is imperative that racing be seen as conducted fairly, a breach of the prohibited substances rule is considered a serious matter. Stewards have taken into account your previous record Mr McIntosh, but also your guilty plea. In similar circumstances trainers have been given disqualifications of nine months and sometimes more than that nine months. Under these circumstances today the Stewards feel the appropriate penalty is a disqualification of your trainer's licence for a period of eight months."*

The Appellant's personal circumstances were submitted by the appellant to the Stewards. Relevantly, the Appellant submitted the following matters:

- He has been involved in harness racing for over 20 years, with particular emphasis on assisting junior drivers;
- He had recently obtained a thoroughbred trainer's licence;
- He is financially dependent on income from training in order to maintain his properties
- His recent health is not good;
- The fact of being convicted and the adverse publicity was an embarrassment;
- He co-operated in full with the Stewards, including pleading guilty;
- He has a previous conviction for a TCO2 offence, 15 years ago.

It is a matter of discretion for the Stewards what penalty to impose. Their decision will only be overturned if there is any error of fact, or the penalty is so far outside the range as to demonstrate that there is an error. In this case, I am not persuaded that the Stewards failed to give proper weight to matters personal to the Appellant. There is nothing to demonstrate that the Stewards failed to do so, other than the Appellant's assertion. The transcript shows that he put all relevant matters to the Stewards.

A penalty anywhere between six months and two years would be within the range for a presentation offence. That was the range referred to in the case of Harvey (Appeal 652). In that case, which was in the racing code, a penalty was reduced from 12 months to six months on appeal. It was a similar case to this, in that the presentation was characterised as inadvertent. In Radford (Appeal 685), again a case in the racing code, a penalty of five months disqualification was reduced to three months on appeal. Radford can be distinguished, because in that case the Tribunal found that the Stewards did not give sufficient weight to mitigating circumstances. That is not the case here.

The Appellant specifically complains that the penalty imposed on him was different than that imposed on a different trainer in similar circumstances. In the case of Gavin, a horse was presented with an excess TCO2 level but the trainer there received a disqualification imposed on him by the Stewards of six months. Co-incidentally, that case was dealt with on the same day as the Appellant's case, but by a different panel of Stewards. The Appellant points out that in that case the trainer had a previous conviction much more recent than his, but still received a disqualification of only six months.

CONCLUSION

In my opinion, the Tribunal is in the same position as an appeal court reviewing the imposition of a penalty. The principles to be exercised in carrying out that function have been expressed in a number of cases. In Dinsdale v R [2000] HCA 54, Kirby J (with whom Gaudron and Gummow JJ agreed) said at paragraphs 57-58

> *"57. The legal process before the Court of Criminal Appeal was, as described, an appeal. This is a creation of statute. An appeal may take several forms, the precise nature in a particular case depending upon the legislation in question. Here, that legislation, by providing for an appeal, required the demonstration of error before the appellate court enjoyed the authority to disturb the decision subject to appeal. In Lowndes v The Queen this Court remarked that:*
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> > *"a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. ... The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice."*
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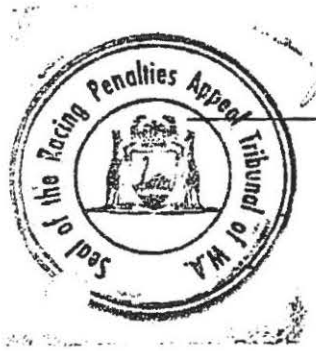
> *58. The necessity to show error in such a case is fully accepted by courts deciding appeals against sentence. Indeed, it is commonly referred to by the Court of Criminal Appeal of Western Australia. Because the imposition of a sentence involves the exercise of judgment and evaluation upon which minds can differ, it bears close similarities to the making of a discretionary decision. Like such a decision, if properly imposed, a sentence will not be disturbed on appeal merely because the appellate court would have reached a different result had the responsibility of sentencing belonged to it. As in the case of appellate review of a discretionary decision, a brake is imposed upon undue appellate disturbance of primary decisions (and unwarranted appeals seeking that relief) by the necessity to identify an error that justifies and authorises appellate intervention. Such an error may involve the adoption by the primary judge of an incorrect principle, giving weight to some extraneous or irrelevant matter, failing to give weight to some material considerations, or a mistake as to the facts."*

It is not for the Tribunal to substitute its own opinion for that of the Stewards. If it cannot be shown that the Stewards were in error, or that the penalty was manifestly excessive, then the penalty will not be interfered with on appeal. In my opinion, the Stewards made no error of

fact or principle. The offence of which the Appellant was convicted here was at the lower end of the scale, and thus deserving of a penalty at the lower end. However, the eight months imposed was itself at the lower end, bearing in mind that the range for a presentation offence can extend up to two years.

For all of the above reasons, I would dismiss the appeal.



PATRICK HOGAN, MEMBER

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REASONS FOR DETERMINATION OF MR W CHESNUTT (MEMBER)

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The Appellant appeared in person.

Mr C Coady appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr P Hogan, Member.

I agree with those reasons and conclusions and have nothing further to add.

Seal of the Racing Penalties Appeal Tribunal of WA

WILLIAM CHESNUTT, MEMBER