RACING APPEAL PANEL NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF LICENSED JOCKEY JAMES ORMAN

Panel: Mr P Santucci (Convenor); Ms S Skeggs; Mr P Losh

Appearances: Mr Van Gestel appeared for the Stewards

Mr P O'Sullivan appeared for the Appellant J Orman

Date of Hearing: 15 December 2020

Date of Orders: 16 December 2020

REASONS FOR DECISION

Mr. P Santucci, Convenor

Introduction

1. The Appellant James Orman was the rider of *Penasquito* in race 7 at a meeting in Ballina on 23 November 2020. On the same day, the Stewards, Mr A Holloway as Chairman, Mr R W Loughlin and Mr B Watling conducted an inquiry into the conduct of the Appellant.

2. The Appellant was charged first, under AR 211 riding overweight, to which the Appellant pleaded guilty. Second, he was charged under AR 229(1)(a), which states:

> (1) A person must not--
>
> (a) engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing.

3. The particulars of the charge that were given to the Appellant on the day are recorded in the transcript of the Stewards inquiry:

> We refer to the dishonest and improper part of the rule, the particulars of the charge being that, after the running of race 7, the Class 2 Handicap 1260 metres at Ballina Racecourse on Monday, 23 November 2020, you, licensed jockey James Orman, did, as the rider of first placegetter, *Penasquito*, engage in a dishonest and/or improper action in that, whilst weighing in after the running of the event, you did attempt to manipulate your true weight by leaning against the scale's digital display."

4. The Appellant pleaded not guilty to that charge.

5. The Stewards found the Appellant guilty of the charge on the basis that he had engaged in a dishonest and improper action.

6. The Stewards imposed a $400 fine for the overweight charge and for the dishonest conduct a one month suspension, commencing on 29 November 2020 and ending on 29 December 2020.

The appeal

7. Pursuant to s 42 of the *Thoroughbred Racing Act 1996*, the Appellant has appealed against the conviction and penalty in respect of the charge of dishonest conduct.

8. The Appellant was represented on this appeal by Mr O'Sullivan. The Stewards were represented by Mr Van Gestel, the Chairman of Stewards.

9. The appeal book was tendered in the appeal as exhibit A.

10. The video footage was tendered in the appeal as exhibit B.

11. A further video was tendered as exhibit C, which was a recreation undertaken by Mr Holloway after the event. That was admitted for the limited purpose of showing the nature of the scales and the type of exercise that was undertaken, but not as evidence of any fact that would be probative of the charge against the Appellant.

12. The allegation is one of deliberate wrongdoing.

The *Briginshaw* test

13. As Mr O'Sullivan, for the Appellant, submitted, the Panel ought to apply what Dixon J said in respect of proof in *Briginshaw v Briginshaw* (1938) 60 CLR 336. In that case Dixon J emphasised that, when the law requires proof of any fact, the Court must

feel an actual persuasion of its occurrence or existence before it can be found. His Honour said that the mere mechanical comparison of probabilities independent of any belief in its reality cannot justify a finding of fact.

14. It has also been explained on numerous occasions that the so-called *Briginshaw* test does not create a third standard of proof between civil and criminal. The standard of proof remains the same. That is the balance of probabilities. But the degree of satisfaction that is required in determining that the standard has been discharged may vary according to the seriousness of the allegations of the dishonesty that are made (see *Qantas v Gama* (2008) 167 FCR 537 [110] per French and Jacobson JJ).

15. Being an allegation of dishonest conduct, this appeal involves a serious allegation, and the Panel accepts it must apply the *Briginshaw* standard.

Consideration of the present case

16. Turning to the facts of the present case.

17. The Appellant was recorded as having weighed out (that is before the commencement of the race) at 57.4kg for a race weight of 56kg. That was in the range of acceptable weight when allowances are made for the jockey's safety vest.

18. The present appeal focuses on the Appellant's conduct when returning to the scales for the "weigh in" after the race.

19. Evidence was given before the Panel by Mr Holloway who was chief Steward in Ballina on the race day. The Appellant also gave evidence before the Panel.

20. Both parties also accepted that the transcript of the Stewards inquiry accurately recorded what was stated at the inquiry.

21. The evidence of Mr Holloway was that, on returning to the scales after the race the Appellant weighed in at 58 kilograms. The Appellant was then told he was close to weight and was asked to take off his gloves.

22. That evidence of the first weigh in on the scales was accepted by the Appellant in the transcript of the Stewards inquiry and was again accepted by the Appellant, in his evidence before the Panel today.

23. At the second attempted weigh in Mr Holloway explained that the Appellant returned to scales with his gloves off and achieved a weight of 57.7 kilograms.

24. That account was accepted by the Appellant in the hearing before the Stewards, but at that time the Appellant proffered the following explanation:

> *Yeah. My leg was touching it, I didn't know what was happening, but I was flat out standing up.* (T3.109 to 110).

25. From that answer it appeared that the Appellant accepted the facts of the account given by Mr Holloway but sought to offer an explanation for the variation in weight, being that his leg was touching the face of the scale, although he was not aware of that fact because he was exhausted from the race and he was struggling to stand up.

26. Mr Holloway recounted that he became concerned that the Appellant was able to lose 300 grams merely by removing his gloves. Mr Holloway's evidence is that he asked the Appellant to return to the scales for a third time.

27. On the third occasion Mr Holloway says he looked around behind or to the side of the Appellant and observed that the Appellant's leg was pressing up against the base of the scale. At that point Mr Holloway's evidence is that he asked the Appellant to move his leg away from the base of the scale, at which point the Appellant's weight was then 58.7 kilograms.

28. The Appellant, both at the Stewards' inquiry and today, appears to have accepted that he in fact weighed in at 58.7 kilograms and that his leg was touching the base of the scale.

29. Importantly however, the Appellant offered a number of explanations as to why this was the case:

    (a) The Appellant said that he consumed a cup of ice after weighing out, but before weighing in. The Appellant had refilled that same cup with water a number of times, possibly from a bottle of water.

    (b) The Appellant said that, even if he had drunk 600mls of water on the day, it did not necessarily follow, according to the Appellant, that it would be equal to only a 600gram increase of weight because, as he said in the transcript, "*When you're sweating, like your body is like a sponge*."

(c) That explanation was repeated in the witness box today, where the Appellant gave evidence that, when wasting, the effect of drinking water is to increase your weight by more than the millilitres that you have consumed.

(d) The Appellant further explained that, despite his vigilance with making weigh in on other occasions, the Appellant may have misjudged the amount he had drunk on the day.

(e) The Appellant also stated that he was exhausted from the race. He was unaware of what his legs were doing and that he was, as he described it: "*flat out standing straight*".

(f) Although he was able to win the race, the Appellant claims that the exhaustion hit him the most after the race, especially when standing inside the weigh in room at Ballina.

(g) The Appellant also claimed he was unaware that the manner in which he was standing on the scales could have resulted in a change of weight being recorded.

30. Mr O'Sullivan submitted, on behalf of the Appellant, that the Panel could not be satisfied of the requisite intention of guilt from the evidence available to the Panel. That was said to be so for a number of reasons.

31. Mr O'Sullivan submitted, first, that there was no motive for the Appellant to have committed this act, given that he only stood to face a $400 fine.

32. Second, it was suggested that the Clerk of Scales who was present in the weigh in room at Ballina ought to have been called on behalf of the Stewards and was not. In those circumstances, Mr O'Sullivan submitted that the Panel should draw a *Jones v Dunkel* inference against the Stewards.

33. Thirdly, as to intention, it was submitted that the Panel ought to take into account the exhaustion of the Appellant and the evidence that he gave that he was not aware that leaning against the base of the scales would alter the weight.

34. Despite Mr O'Sullivan's compelling argument on behalf of the Appellant, the Panel was ultimately unpersuaded and the appeal as to conviction will remain undisturbed.

35. The case raised by the Stewards was accepted almost in its entirety by the Appellant at the Stewards' hearing, save for the intentional element of dishonesty. We also accept the case presented by the Stewards on this rehearing.

36. Although there was some cross-examination of Mr Holloway, it did not affect our willingness to accept the case presented by the Stewards nor his direct evidence of seeing the Appellant's leg on the face of the scale.

37. The case raised by the Stewards was able to establish certain clear and proved facts in respect of the weigh in, including that at least on the third occasion the Appellant's leg was seen by Mr Holloway to be up against the screen of the scales. At that point in time Mr Holloway's evidence was he was close enough to touch the Appellant, and therefore closer to the Appellant than the Clerk of the Scales.

38. Even if we had accepted that a *Jones v Dunkel* inference ought to be drawn to conclude that any evidence from the Clerk of the Scales would not have assisted the Stewards case, such an inference would not have affected the outcome of the present appeal. Mr Holloway had the best vantage point. Moreover, the Appellant accepted his leg was in fact on the face of the scale.

39. As pointed out by the Stewards during the inquiry and again at the appeal today, Race 7 was the lightest ride of the Appellant's on the race day. In Race 2 the racing weight for his ride was 59.5 kilograms. In Race 3 the racing weight was 59 kilograms and in Race 5 the racing weight was 58 kilograms.

40. For the race in question, Race 7, the racing weight was 56 kilograms.

41. The Appellant gave evidence of the fact that he needed to be wasting on the day. In the Panel's view, in those circumstances the Appellant would have been acutely aware of the need to reach the correct weight for each of his rides and, in particular, for the final ride of the day. He accepted in evidence that he was conscious of his weight throughout the day's racing.

42. It would have been clear to the Appellant when weighing out before the race at 57.4 kilograms that he was right on the boundary of the acceptable weight for this ride when allowing for the 1 kilogram for the protective vest. In those circumstances the Appellant would have been aware of the vigilance required to make the correct weight and the need to monitor closely what was being consumed.

43. In those circumstances it was open to the Panel to infer from those proven facts the relevant state of mind to constitute dishonest conduct, unless a satisfactory explanation could be proffered by the Appellant as to the position of his leg on the scales.

44. An explanation was given by the Appellant to the Stewards' inquiry, which was not accepted by them. Further evidence was given today to bolster that explanation to the Panel.

45. In the present case, the Panel feels the necessary level of persuasion that the Appellant placed his leg on the scale in a deliberate manner with intention to weigh in dishonestly at a weight that he could not otherwise make.

46. The Panel accepts that the Appellant may have consumed water and may well have been tired, perhaps even exhausted, but ultimately, we are not satisfied by the explanation that has been given by the Appellant.

47. First, consuming enough water to vary the scales by a weight of 1.3 kilograms would have been reckless for any rider who was wasting throughout the entire day. That evidence struck the Panel as implausible.

48. Second, although no doubt tired from the day's racing, nothing in the video footage in Exhibit B suggested the Appellant, dismounting his horse and returning for the weigh in, was so exhausted from his ride that he was unable to control, or be aware of, where he positioned his feet on the scales. The footage was taken after the race had concluded and evidence was given that about two minutes had elapsed after the race and before the start of the video footage.

49. Third, the Panel did not find the Appellant's evidence convincing when he suggested that he had lent against the scales accidentally or unintentionally and, importantly, the Panel was not convinced by the evidence that he was unaware that leaning against the face of scales could alter the weight.

50. In light of those matters, the Panel was not satisfied by the explanation offered by the Appellant. We felt comfortable in drawing an inference of deliberate dishonest conduct and the Stewards' findings will be confirmed.

Penalty

51. After giving reasons for dismissing the appeal on conviction, separate submissions were advanced by each party. Mr Van Gestel provided a number of precedent cases of similar charges.

52. Mr O'Sullivan submitted that some of the precedents that were advanced by the Stewards were not relevant. However, Mr O'Sullivan accepted that the case of a Jockey *McMahon*, on 17 February 2017 at Ballina, was most relevant to the present case and accepted that it could be distinguished by the fact that in that case the jockey pleaded guilty and gave forthright evidence. In that particular case, the jockey was given 14 days.

53. In the present case, Mr O'Sullivan submits that a more appropriate penalty would be a suspension of 14 to 21 days.

54. We do not accept the submissions of Mr O'Sullivan in that respect.

55. This Panel has summarised the applicable principles on a number of occasions. The offence of which the Appellant has been found guilty is a breach of the Australian Rules of Racing. Those rules are adopted by the *Thoroughbred Racing Act* and inter alia govern thoroughbred horseracing in New South Wales. The regulatory regime bears a closer relationship to professional discipline rather than to the criminal law. Disciplinary proceedings in this respect are described as being entirely "protective".

56. In such proceedings the penalty must recognise the importance of deterrence, particularly in regard to the protection of the public. Deterrence will have a broad application in respect of the Rules of Racing. The principles will extend not only to protection of the public, but also the promotion of the safety of horses and jockeys, as well as the integrity of racing.

57. In determining the penalty, consideration may be given to the deterrent effect that the penalty might achieve in deterring a repetition of the offence, and in deterring others who might be tempted to fall short of the high standards expected of them under the Rules of Racing. The penalty may also be seen as publicly marking the seriousness of the offence.

58. In the circumstances of dishonest conduct it remains a serious charge, although notably we accept it is not a charge with respect to altering the outcome of the race.

59. The element of deterrence in the present case is an important one. The penalty should be one that makes clear that this type of conduct is not to be engaged in and should not be something that ever factors into a jockey's decision-making when approaching a race or attempting to weigh in or weigh out for a race.

60. We are not persuaded that the sentence should be altered in any way. The integrity of racing remains paramount and given, as we have said, the offence has an element of dishonesty, we consider the sentence to be appropriate.

61. Following the pronouncement of reasons, the parties reached a consent position on the time at which the sentence should commence being from 18 December 2020 and continuing for one month.

62. Accordingly, the Panel makes the following orders:

    (1) The appeal against the conviction is dismissed.

    (2) The appeal against severity of the penalty is dismissed.

    (3) The Panel determines that the period of suspension can commence on 18 December 2020 and expire on 18 January 2021.

    (4) The appeal deposit is forfeited.
