APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF MATT SCHEMBRI

Appeal Panel:	**Mr R. Beasley SC – Presiding Member; Mr R. Clugston; Mr C. Tuck**
Appearances:	**Appellant – Mr R. Hammill, of Counsel**
	Racing NSW – Mr M Van Gestel, Chairman of Stewards
Date of hearing:	**3 May 2019**
Date of Reasons:	**14 May 2019**

REASONS FOR DECISION: PRINCIPAL MEMBER

Introduction

1. On 4 June 2018, 11 July 2018 and 12 November 2018, the Racing NSW Stewards conducted an inquiy into whether the horse *Aussie Jack* had been given a race day injection without their permission prior to it running at the Broken Hill races on 17 March 2018. The Stewards were also investigating whether *Aussie Jack* and his stablemate *Ali Taka* had been stomach-tubed on that day prior to both racing in the Broken Hill races.

2. Both horses were trained by licensed trainer Mr Kym Healey. Following the inquiry, Mr Healey was found guilty of a breach of AR178E(1) for administering medication on a race day to *Aussie Jack* without the permission of the Stewards. He was also found guilty of a second charge under AR178AB(1)(a) of injecting that horse on race day without the permission of Stewards. He was further found guilty of a breach of AR175(l) for conspiring with Mr Michael Honson and the Appellant to stomach tube the horses *Aussie Jack* and *Ali Taka* on 17 March 2018, prior to those horses running at the Broken Hill races that day. Mr Healey pleaded not guilty to the first two charges, but guilty to the third charge. He was penalised by way of a 6-

month disqualification of his licence for each charge, although the penalty for the third charge was reduced to 4 months as a result of his guilty plea. Penalties for charges 1 and 2 were ordered to be served concurrently, with the 4-month sentence for charge 3 being cumulative to that 6-month disqualification for charges 1 and 2.

3. Mr Healey appealed to the Racing Appeal Panel, and changed his plea in respect to the conspiracy charge from guilty, to not guilty. He was, however, found guilty by the Panel of a breach of the rule. By changing his plea, it seems that he lost some of the benefit of his original plea of guilty, and by agreement between his advisors and the Stewards, his penalty for charge 3 was increased from 4 months to 5 months.

4. On 12 November 2018, the Appellant was also charged with a conspiracy offence (**Charge 1**), which is now AR227(b) of the Australian Rules of Racing, which is in the following terms:

> *"Without limiting any other powers, a PRA or the Stewards may penalise any person who:*
>
> *...*
>
> *(b) attempts to commit, aids, abets, counsels, procures, connives at, conspires with another person to commit, or is a party to another person who commits, a breach of the rules."*

5. The particulars of the alleged breach were that the Appellant had conspired with Mr Healey and Mr Honson to stomach tube the horses *Aussie Jack* and *Ali Taka*, which is a breach of AR255(1)(a) and AR249 (race day administration).

6. The Appellant was also charged with a breach of AR232(b) (**Charge 2**) which provides that a:

> *"...person must not ...*
>
> *(b) fail or refuse to comply with an order, direction or requirement of the Stewards or an official."*

7. The particulars of this offence were that the Appellant had not complied with a direction of the Stewards on 30 July 2018 to provide his itemised mobile phone call records for the period 1 March 2018 to 18 March 2018.

8. The Appellant was also charged with a third breach of the rules (**Charge 3**), for giving false evidence at the Stewards' Inquiry, held on 11 July 2018. It was alleged that on 7 occasions he gave evidence on that date to the Stewards knowing that the evidence he was giving was false. This was said to be in breach of AR232(i) which provides that a person must not *"give any evidence at an interview, investigation, inquiry, hearing and/or appeal which is false or misleading"*. This was former AR175(g).

9. The Appellant pleaded 'not guilty' to each charge, but after considering the evidence, the Stewards found him guilty. In respect to Charge 1 (the conspiracy charge), the Appellant was penalised by way of disqualification of his licence for 6 months. In respect of Charge 2 (failing to hand over his mobile phone records), he was penalised by way of a disqualification of 12 months. His licence was also disqualified for a period of 12 months in relation to Charge 3 (giving false evidence at the Stewards' Inquiry).

10. As they arose from the same or similar factual circumstances, the Stewards ordered that the penalty in respect to Charges 1 and 3 be served concurrently, but the 12-month disqualification for Charge 2 be cumulative to those penalties. The total penalty therefore imposed on the Appellant was a 2-year disqualification of his licence to train.

Appeal Hearing

11. At the appeal hearing, Racing NSW was represented by the Chairman of Stewards, Mr M Van Gestel. With leave, the Appellant was represented by Mr R. Hammill of Counsel. As a result of advice Mr Hammill had recently provided to the Appellant, the Panel was told at the outset of the hearing that the Appellant was changing his plea in respect to all three charges from not guilty to guilty. The appeal therefore proceeded as an appeal against the severity of the penalty imposed on the Appellant.

Mr Van Gestel's Submission

12. Unsurprisingly, Mr Van Gestel submitted that each offence was objectively serious. No sensible submission could be made to the contrary. In relation to Charge 1, it is obvious that stomach tubing a horse on a race day is conduct that is particularly damaging to the image and integrity of racing. Put bluntly, it is cheating. As a matter of obviousness, it is not something that the racing public, and the public generally, would expect should happen to a horse.

13. A licensed person failing to comply with a direction of the Stewards to supply their phone records is, in the circumstances of this particular Stewards' Inquiry, also objectively serious offending. The Stewards were not requiring the Appellant's phone records as a means of prying into his private affairs. They were investigating circumstances concerning the stomach tubing of horses on race day, and the injecting of substances into another horse on a race day without permission. They were investigating whether the Appellant, with two other persons, including the trainer of the horses involved, had engaged in a conspiracy to commit these breaches of the Rules. A licensed person such as the Appellant, in failing to provide Stewards with the assistance requested when they asked for his phone records, is clearly engaging in objectively serious offending.

14. Little needs to be said about the third offence. As a matter of obviousness, giving false evidence to Stewards, particularly in the course of a Stewards' Inquiry, is obviously serious offending. The Stewards are charged with upholding the integrity of racing. If licensed persons are unwilling to cooperate with Stewards in that task, or worse still, lie to them, the Stewards are obviously hampered in their task, and the integrity of racing is damaged.

15. Mr Van Gestel also submitted that, despite the Appellant's change of plea to guilty for each breach of the Rules, given that change of plea was made so late in the day, he should not get the benefit of any discount for the penalties imposed on him. In relation to this, Mr Van Gestel drew the Panel's attention to the appeal of *Blake Shinn* (13/2/18), which was an appeal involving a careless riding charge, where Mr Shinn had pleaded not guilty at the Stewards inquiry but then pleaded guilty before

the Panel and sought a discount of the penalty to be imposed on him as a result of that plea.

16. In relation to the actual penalties imposed on the Appellant for the individual breaches, Mr Van Gestel said that the penalty in relation to the conspiracy offence was in line with the penalty imposed on Mr Healey. As to the 12 month disqualification for Charge 3 in relation to giving false evidence, Mr Van Gestel submitted that this penalty was in line with the recent decision of the Racing Appeal Tribunal in the appeal of *Carl Poidevin*, and that the penalty for Charge 2 for failing to supply phone records when requested by the Stewards should be in line with the penalty imposed for giving false evidence.

Submissions of Mr Hammill

17. The main thrust of Mr Hammill's submission was that the Appellant, having changed his plea to guilty, should get the benefit of some discount for that plea. In his submission, there is always utility in a plea of guilty, even at a late stage, which should be recognised by a discount from the head penalty.

18. Mr Hammill also submitted that for a considerable period of time, the Appellant had been taking his own counsel in relation to the charges against him, or had been listening to people arguably not properly qualified to give him the best advice in the circumstances he was facing.

19. Mr Hammill also suggested that there was a disparity between the penalties imposed on Mr Healey, who was the trainer of the horses, and the Appellant. Although the disqualification imposed on the Appellant is longer than that imposed on Mr Healey, there was limited force at least in this submission from Mr Hammill, given that the only charge in common between Mr Healey and the Appellant was the conspiracy charge. To paraphrase Mr Hammill, the Appellant had made a "rod for his own back" in relation to Charges 2 and 3.

20. In relation to the giving false evidence offence, Mr Hammill submitted, and I accept, that rather than there effectively being 7 lies told by the Appellant on 11 July 2018,

it is really the one lie repeated over and over: that is, despite the weight of the evidence against him, he continued to deny guilt.

Decision on Penalty

21. I accept all of the submissions made by Mr Van Gestel about the objectively serious nature of the offending here. Each breach of the Rules is damaging to the integrity and image of racing. Further, failing to comply with the direction of the Stewards to provide his phone records, in the circumstances here and given the nature of the Stewards inquiry, was an attack on the Stewards' capability to investigate serious breaches of the Rules. The same can be said in relation to the false evidence breach.

22. In addition to Mr Hammill's submission that it was same untruth told over and over again, Mr Hammill also submitted that there was a considerable amount of naivety about the Appellant, and the manner of him giving the false evidence was that of an amateur. In short, it was submitted that the untruths told by Mr Schembri were easily discoverable by the Stewards, and this was not the case of someone giving false evidence in relation to a complex matter in circumstances where it would be harder for the Stewards to uncover the truth. While there is some force to that submission, I am not convinced that it will always follow that someone giving evidence that is obviously false should get a lesser sentence than someone who gives false evidence where the falsehood is harder to detect. It will always turn on what conduct is more damaging to the interests and integrity of racing.

23. In all the circumstances, I consider the head sentence imposed by the Stewards in relation to Charges 1 (6-month disqualification), 2 and 3 (12-month disqualification for each) are the appropriate penalties to be imposed. I also agree that it is appropriate that the penalties for Charges 1 and 3 be served concurrently, but the penalty for Charge 2 be cumulative to those penalties.

24. In relation to discount for plea, I am in agreement with the submissions made by Mr Hammill. First, what was said in the appeal of *Blake Shinn* is distinguishable from the situation here. Mr Shinn had been charged with careless riding, and on the morning of the appeal changed his plea to guilty. In circumstances such as that, and in the context of a charge of careless riding, riders are unlikely to receive the benefit

of a discount for pleading guilty on the morning of an appeal hearing. I would not go as far as to say that it will never happen – there may be very good reasons why, in some limited circumstances, it might still be appropriate to give some form of discount for a plea, but this will not be common.

25. The circumstances are different here, however. The charges against the Appellant were more complex and more serious. He clearly could have done with the benefit of competent legal advice at an earlier stage. I agree there is still utility in his late plea of guilty before the Panel. It would not be, in my view, in the interests of any relevant party – Racing NSW, the Stewards or appellants – if the Panel were to take the position that no discount for plea is available if a plea of guilty is entered at a late stage.

26. The normal discount for a plea of guilty for the kinds of offences the Appellant has been found to have engaged in would be up to 25%. He is not, in my view, entitled to that full discount, largely because of the lateness of his plea. Rather than suggest any particular form of percentage, I would impose the following penalties for the three breaches of the Rules as follows:

> Charge 1, in relation to the conspiracy offence under AR227(b): a 5-month disqualification of the Appellant's licence which reflects a discount for his guilty plea today.
>
> Charge 2, for the failure to provide the Stewards with his mobile phone records in breach of AR232(b): a 10-month disqualification of the Appellant's licence reflecting a discount for his plea of guilty today.
>
> Charge 3, relating to giving false evidence at the Stewards inquiry: a 10-month disqualification of the Appellant's licence again reflecting a discount for his guilty plea today.

27. The penalties in relation to Charges 1 and 3 should be served concurrently, and the penalty in relation to Charge 2 should be cumulative to those penalties. Both Mr Clugston and Mr Tuck agree with the above reasons, and also with these penalties.

The total penalty therefore that is imposed on the Appellant's licence is a 20-month disqualification.

28. The orders of the Panel are therefore as follows:

(1) Note that the Appellant has changed his plea from not guilty, to guilty, in respect to the charges under AR227(b), AR232(b) and AR232(i).

(2) Find the Appellant guilty of a breach of AR227(b), AR232(b) and AR232(i).

(3) Allow the appeal in respect to the severity of the penalty imposed.

(4) In lieu of disqualification of 2 years, the Appellant's licence is disqualified for a period of 20 months. That penalty commenced on 12 November 2018, and will expire on 12 July 2020, on which day the Appellant may reapply for his licence.

(5) In lieu of the late change of plea, appeal deposit forfeited.