

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR MARK PURDON

APPLICATION NO: A30/08/807

PANEL: MR P HOGAN (PRESIDING MEMBER)

DATE OF HEARING: 22 DECEMBER 2017

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IN THE MATTER OF an appeal by MARK PURDON against the determination made by Racing and Wagering Western Australia Stewards of Harness Racing on 8 December 2017, imposing a suspension of twenty-six days for breach of Rule 163(1)(b) of the Racing and Wagering Western Australia Rules of Harness Racing.

Mr T F Percy QC represented Mr Purdon.

Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

ORAL REASONS FOR DETERMINATION ON THE DAY OF HEARING:

1. In this case, the appellant, Mr Purdon, appeals against a decision of the Racing and Wagering Western Australia Stewards of Harness Racing imposing a suspension of 26 days for an offence against rule 163(1)(b) of the Rules of Harness Racing. The penalty was imposed on 8 December this year following the running of race 7 that evening.
2. In that race Mr McCarthy drove Vampero (NZ) and Mr Purdon, the appellant here, drove Ultimate Machete (NZ). The stewards opened an inquiry after the race and heard from the

steward, Mr Adams, who had a view, and heard from the driver Mr McCarthy and they heard from Mr Purdon himself. At the conclusion of that part of the inquiry, the stewards determined that Mr Purdon had a charge to answer under rule 163(1)(b) and the particulars of that allegation were set out at page 6 of the transcript.

3. It was said that Mr Purdon, approaching the first turn, had shifted from a marker position to a two-wide position, when insufficiently clear of Vampero (NZ) and as a result Vampero (NZ) had been carried up to a three-wide position and this occurred before the designated ease out position on the track. That was the allegation that was put to Mr Purdon and he understood it. One doesn't need to go to rule 164 and talk about the designated ease out position on the track because this move was nowhere near that.
4. Mr Purdon pleaded guilty to that and fairly quickly the stewards moved on to the matter of penalty and the question was asked by the chairperson of Mr Purdon – the chairperson said, "Do you want to address the stewards on penalty?" and the appellant's answer was, "No, no. You'll have a standard penalty, I presume." And the chairperson said, "No. Okay."
5. That was the beginning of something of a misunderstanding between the stewards and the appellant. It was apparent from that that in terms of fairness, the appellant was given an opportunity to address on penalty. He said no. He presumed there would be a standard penalty. The chairperson didn't say there was going to be a standard penalty. The case moved on. It was only after the imposition of the penalty that the appellant realised that what he thought was the standard penalty wasn't the standard penalty being thought of by the stewards.
6. I infer all of that from the transcript of proceedings. I infer that for a number of reasons: (1) because immediately after the imposition of the suspension, Mr Purdon, the appellant, who earlier had said he didn't want to address on penalty simply asked the question, "Would I ask you to reconsider a fine?" It is fair to assume that he thought the standard penalty would be a fine.
7. Having been asked that question, the chairperson then said, "We don't generally fine for offences under this rule." In the context of what had gone before, that answer means, "No, we won't consider a fine." That answer couldn't mean anything else. I accept it is qualified by the word "generally", but in the context That is what it means.
8. Whenever the stewards are called upon to consider a penalty, the stewards are engaged in

an exercise pursuant to rule 256 of the Rules of Harness Racing. The Rules are made by RWWA. RWWA is given power to make rules under the Act and in rule 256(2) there is a list (a) to (j) of the different kinds of dispositions, to use a neutral word, that can be imposed. They include the two things spoken about mostly in this appeal, namely a fine, and they include a suspension and the dispositions go down so far as a reprimand or a severe reprimand.

9. Those penalties therefore – because they are in the Rules – must be considered in every particular case. On the facts, sometimes some of those penalties might not even arise for consideration, might not even merit speaking about by a person before the stewards or the stewards, but they all have to be considered. When a person comes before the stewards bound by the Rules and when the stewards make a decision, or impose a penalty, are bound by the Rules. Everybody comes to the hearing or the inquiry knowing and expecting that rule 256 would apply to them.
10. RWWA has also published guidelines for the imposition of penalties. The publishing of guidelines is a good thing. It promotes certainty. It promotes consistency. That is drivers and other people involved know what might happen should they be facing a penalty, but the guidelines obviously don't have the same force and effect as the Rules. So much is apparent even by the use of the word "guidelines". They only deal with statutory interpretation in the hierarchy of things, guidelines or policies; come lower in the hierarchy of Rules.
11. I repeat, it is a good thing to have guidelines. It is a good thing to have policy, but policy can't – well, let me put this a different way. Where the stewards have got a discretion, as they have in rule 256, and they have to exercise that discretion according to the merits of the case and they can't inflexibly apply a policy to the exercise of a discretion in 256.
12. I have tried to paraphrase what is said in the case law in Quark Technologies, but what it means is that the stewards have to exercise the discretion given to them by 256 and they can't inflexibly apply the policy, which is set out in the penalty guidelines. There are two steps in the penalty guidelines. One is a beginning point for this and other driving offences and the next step is an increase on those for group offences and following that there is a reversion to the penalty guidelines themselves and discounts for various things, so it is a multi-step procedure.
13. It is certainly not an intuitive synthesis, as is sometimes spoken about in the criminal law; far from it. The appellant says that is what happened in this case. The appellant says that

the stewards didn't exercise their discretion because they didn't consider a fine, which is what the appellant asked them to do, and he did ask them to do that after some toing and froing and probably some misapprehension on his behalf and, as I said earlier, by the chairperson's answer, the chairperson said, "No, we're not going to consider a fine."

14. I should add that they got the obvious, which is that the penalty guideline for an offence like this, the driving offence, is a beginning point, I think, of 28 days. It is set out in the guidelines and then, as I said, increases for the group racing policy and some decreases for mitigating factors. It is well established that an appeal against the discretionary decision won't be allowed unless the appellant can point to some error of fact or law or undue weight being given to a matter of fact or not even enough weight being given to a matter of fact or that a penalty is so outside the range that it demonstrates error.
15. If an Appeal Court finds that to be the case, then in the criminal law a number of things can follow because appeal principles borrowed from the criminal law – well, not really, it's borrowed from the law on appeals from discretionary decisions – but in a criminal Court, the Court would allow an appeal if any of those things were found and then set aside, resentence or increase, decrease a particular sentence, it will dismiss an appeal and that is the type of approach that this Tribunal often takes when the Tribunal allows an appeal, sometimes set aside or vary.
16. However, I have had occasion to look again at the Racing Penalties Appeal Act and I look again at section 17 and the powers of this Tribunal on an appeal and I look at section 17(9)(c) and on appeal this Tribunal can confirm, vary or set aside the determination appealed against. I will leave that to the side for a second.
17. There is no doubt in my mind that the stewards made an error of law in not considering whether or not there should be a fine. In the classic language of appeals, that would lead to the appeal being allowed. That terminology doesn't appear in section 17(9). I am asked today from the appellant's side, leaving that side issue alone for a moment, to resentence – if I was to allow the appeal, to resentence the appellant this afternoon and either a fine or time served, namely 14 days is urged upon me.
18. I accept for the present purposes that I am speaking of at the moment that because I have said the stewards made an error of law that in the classic sense the appeal should be allowed, but I haven't said that yet and the appellant should be resentenced. So I embark upon a resentencing exercise and on the resentencing exercise, I take into account – the resentencing exercise I exercise the discretion given to me now by rule 256 and I cast my

mind to all of the penalties available under rule 256. I am able to embark upon that resentencing exercise because I have been provided in the hearing of this appeal with sufficient information to do so, namely, for example, the financial impact on the appellant. I have more detail of his driving history. I have the benefit of the submissions on the objective seriousness of the offence, to name a few factors.

19. The discretion given by section 256 – the discretion that I need to exercise includes the type of penalty, as well as the severity of the penalty witness that type. Say, for example, there was to be a suspension, I would have to consider the length. If there was to be a fine, I would have to consider the amount. In this case, I consider that the severity of the driving in this case was such as to attract a period of suspension.
20. It is the case, I accept what counsel for the stewards says, that it's the effect upon the race in terms of consequential effects, which dictates the severity of the driving. This happened very early in the race. One horse was caused to go wider and lose ground. Mr Purdon got a better position. It is not to the point, with respect to counsel for the appellant, that there is no overt physical interference or some catastrophic event. That is not what rule 163 is about.
21. So this particular piece of driving was one which, in my view, merited suspension. As to the length of the suspension, there is nothing wrong with a starting point. The stewards use a starting point set out in their guidelines, although I haven't had any cases put to me on what commonly imposed penalty would be for this type of thing. I do know, and I take it to be, that it would be a suspension or around 28 days. That is what people used to get before I saw the guidelines.
22. I then take into account the various mitigating factors, namely – and I take into account the email that I have got here sent to Mr Percy from, I presume on behalf of, the appellant and it is clear enough that the appellant is going to miss out on a chance to take part in the winning of some fairly serious money over the next few meetings. That sounds like a fairly off-hand way to put it, but it's the best way I can put it. That is certainly a mitigating factor in the sense of what he might lose.
23. There is the plea of guilty taken into account and his good record in the sense of the number of times he goes around and doesn't get suspended. There is also to be taken into account the fact that this was a group race and because of the bigger money on offer and the public scrutiny, it's an acceptable principle of general deterrence that people in driving races like that should know that if they break the rules then there's likely to be a more

severe penalty. That is nothing more, as I said, than an expression of general deterrence. I should add as a sideline at this stage, I don't see this case has got anything to do with pedestrian. It is not as if Mr Purdon drives like this all the time or, in fact, badly at all. It is a case about general deterrence more than anything else.

24. The stewards went about the exercise of that part of their discretion in fixing the period of suspension in a little bit more detail than I have just said. There is nothing wrong with that and in doing that, they were following their guidelines. I determine, apart from the guidelines, that there should be a period of suspension and I take into account all the mitigating factors put to me and in the transcript and determine that it is 28 days.

25. Therefore, instead of using the term, as is commonly used in the criminal law and the Court of Criminal Appeal of allowing an appeal, it is proper that I use the terms in the Racing Penalties Appeal Act and say that I confirm the penalty. So for those, hopefully, understandable reasons, the appeal is dismissed.



PATRICK HOGAN, PRESIDING MEMBER

