APPEAL - 202

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT : **FRANK HENRY MAYNARD**

APPLICATION NO. : **A30/08/202**

PANEL : **MR D MOSSENSON (CHAIRPERSON)**
MR F ROBINS (MEMBER)
MS P HOGAN (MEMBER)

DATE OF HEARING : **30 JUNE 1994**

IN THE MATTER OF an appeal by Mr F H Maynard following the redetermination by the Western Australian Turf Club Stewards on the 3 June 1994 against a three year disqualification for breach of Australian Rule of Racing 175(h)(ii).

Mr M J McCusker QC and Mr T J Kavenagh instructed by Kavenagh & Co appeared for the appellant.

Mr R J Davies QC appeared for the WATC Stewards

Mr Maynard has been a professional horse trainer for approximately 20 years. This occupation is his only source of income.

The matter before the Tribunal has had a very long and checkered history which commenced on 6 March 1993, when one of the horses, which Mr Maynard was training, called PALATIOUS, was treated by his veterinary surgeon Dr Gales for inflammation of the joints. Dr Gales injected the horse with a substance known as methylprednisolone acetate (MPA), which is also known as depo-medrol. Although MPA is a prohibited substance as defined by the Rules of Racing, it is commonly used by veterinary surgeons for the purpose of treating horses suffering from inflammation of the joints. There was nothing improper in Dr Gales using the substance to treat PALATIOUS. According to Dr Gales he administered MPA to the horse with the agreement of Mr Maynard.

Mr Maynard relied on Dr Gales for his advice in this regard and also for his advice as to when the horse would be ready for racing again. Dr Gales had advised that PALATIOUS would be ready to race 14 days after the treatment. Relying on that advice Mr Maynard entered the horse in a race on 20 March 1993. PALATIOUS ran and came second. No tests were then conducted on the horse. PALATIOUS raced again on 27 March 1993, when it won the Singapore Tourist Promotion Board Handicap at Ascot Racecourse. The horse was tested after the second race and MPA was detected.

The Stewards held an inquiry into the circumstances under which the MPA had been detected. Mr Maynard gave evidence that he "took PALATIOUS to the racecourse firmly believing that she was free of any medication drugs".

Dr Gales testified that he "felt comfortable" with PALATIOUS racing 14 days after he had injected MPA into her joints "because amongst Perth's equine practitioners, it is an accepted code of practice to inject fetlock joints and knee joints with (MPA) 14 days prior to racing". Dr Gales' evidence in this regard was further supported by letters from other veterinary surgeons to this effect and the oral evidence of another veterinary surgeon, Dr Hilbert. It was pointed out that the Western Australian Racing Calendar issued by the Club records that the Australian Equine Veterinary Association recommended in November 1988 an excretion time of 21 days for intra-articular use of MPA. This was particularly relevant as a period of 21 days had elapsed between Dr Gales' administration of MPA to PALATIOUS and the time when traces of the drug were found after it had won on 27 March 1993.

There was no evidence that the drug had been administered to the horse at any time later than 6 March 1993. According to Dr Gales the explanation for the continued presence of MPA in the horse was the unpredictable behaviour of the drug which he said "has been demonstrated before". Dr Hilbert agreed that there was an element of unpredictability about the behaviour of MPA. According to Dr Hilbert the period of excretion of the drug was significantly dependent upon exactly where it was injected and that this was a matter of which only Dr Gales would have knowledge.

After hearing the evidence at the inquiry, the Stewards charged Mr Maynard under Rule 175(h)(ii). That Rule states:-

> "The committee of any club or the stewards may punish ...
>
> (h) Any person who at any time administers, or causes to be administered, any prohibited substance as defined ...
>
> (i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing it starting in a race; or
>
> (ii) which is detected in any pre - or post-race sample taken on the day of any race."

Mr Maynard was found guilty by the Stewards and was disqualified for a period of three years. He appealed against both the conviction and penalty to the Tribunal. It was submitted to the Tribunal at the hearing on 6 July 1993 that the Rules of Racing have statutory effect and the defence of honest and reasonable but mistaken belief applied by virtue of s24 of the *Criminal Code*. It was also submitted that in any event the common law defence of honest and reasonable mistake was available to the appellant.

These submissions were rejected by the Tribunal. The Tribunal dismissed the appeal against conviction but upheld the appeal against the punishment imposed and reduced the period of disqualification to two years.

The appellant instituted proceedings in the Supreme Court seeking a writ of certiorari against the Tribunal on the basis that the Tribunal incorrectly construed Rule 175(h)(ii). By a majority decision of Ipp J and Wallwork J, with Seaman J dissenting, the Full Court ordered a writ of certiorari to issue. As stated by Ipp J (at pages 23 and 24):-

> "In my opinion, a presumption applies to the Rules of Racing that honest and reasonable mistake will be a defence to offences created thereby, unless an intention to exclude that defence plainly appears from the rule in question. In my view there is nothing in the words of Rule 175(h)(ii), in the Rules of Racing as a whole, and the subject matter of the offence created by Rule 175(h)(ii) that can be said plainly to lead to the exclusion of that defence. It would have been possible for the Rules of Racing to provide for such an exclusion, but they do not do so.
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> The declaration sought by the applicant is that Rule 175(h)(ii) requires the negation of an honest and reasonable but mistaken belief that any prohibited substance administered or caused to be administered had been excreted by the race day and therefore would not be present in the blood or urine. I consider that the implication of such a provision (subject to the qualification that the person charged must first properly raise the issue) is in accordance with the elementary rules of justice. In the same way as the rules of natural justice have been held to be a necessary implication, by operation of law, to the Rules of Racing, so do I consider that the elementary rules of justice are so necessary. It could hardly be unnecessary for the Rules of Racing not to conform with elementary rules of justice.
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> I would therefore grant a declaration that it is implicit under Rule 175(h)(ii) that, provided there is evidence which raises the question (cf ***He Kaw Teh v The Queen*** at 535), there can be no finding that an infringement has been committed unless there has been a negation of an honest and reasonable but mistaken belief that any prohibited substance administered or caused to be administered to a horse had been excreted by the race day and therefore would not be present in the blood or urine.
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> As the Tribunal decided the applicant's appeal on the basis that Rule 175(h)(ii) provided for absolute liability, I consider that it fell into an error of law and I would uphold the order *nisi*, and order that a writ of certiorari issue, quashing the Tribunal's decision of 6 July 1993 whereby it dismissed the applicant's appeal against the finding by the stewards that he had infringed Rule 175(h)(ii)."

The matter came back before the Tribunal on 25 May 1994 when the Tribunal upheld the appeal, quashed the conviction and required the Stewards to re-hear the matter in accordance with the reasons of Ipp J.

The Stewards conducted a re-hearing on 3 June 1994. At that hearing further evidence was presented. The Stewards, after giving fresh consideration to this matter, charged Mr Maynard with a breach of Rule 175 (h)(ii). The specifics of the charge were that:-

> "... presenting PALATIOUS to race in Race 5, the Singapore Tourist Promotion Board Handicap over 1400 metres at Ascot on the 27th of March, 1993, the post-race urine sample taken from PALATIOUS having detected in it the prohibited substance methylprednisolone, as defined in Australian Rule of Racing 1, and this detection being confirmed by the Australian Jockey Club itself."

Although Mr Maynard again pleaded not guilty the Stewards came to the following conclusion:-

> "the Stewards have given specified thought as to whether you held an honest and reasonable belief that PALATIOUS would race and test drug free. Given the Veterinary opinion at that particular time related to the unpredictable nature of methylprednisolone, and the fact that you did not avail yourself of the pre-race elective swabbing facility, Stewards find you guilty of the charge."

As a result the Stewards imposed a disqualification for a period of three years as they had originally. Mr Maynard appealed against this decision on the following grounds:

"Ground 1 (a) The Stewards erred in convicting me by failing to properly consider the defence of honest but reasonable mistake. There being no evidence before the Stewards capable of negating the said defence.

(b) The decision of the Stewards was against the evidence and the weight of evidence.

Ground 2 The penalty imposed by the Stewards was excessive in all the circumstances of the case."

Mr McCusker QC, for the appellant, submitted that Mr Maynard was not guilty if he acted under an honest and reasonable but mistaken belief. Secondly he submitted that the burden of proving the absence of that belief was on the respondent. In essence the belief which was honestly and reasonably held was that PALATIOUS was safe to race after 21 days based upon reliance of the advice received from Dr Gales. There was no evidence to negate that belief or any evidence that it was unreasonable. There was nothing to suggest that Mr Maynard should not rely upon his veterinary's advice and put his licence on the line. At the time the advice was given it was the accepted wisdom in the profession. Unless Mr Maynard knew that the veterinary whose advice he relied upon could not be relied upon then it was irrelevant to say that there was some veterinary advice around to the effect that the drug in question was unpredictable. It was inappropriate to draw any inference from the fact that Mr Maynard did not avail himself of the elective pre-race swabbing and he had no doubt that it was safe to race the horse after 21 days having been advised that it was safe to race the horse after 14 days.

By way of contrast Mr Davies QC argued that a trainer is contractually bound by the Rules of Racing and cannot abdicate entirely his responsibilities to a veterinary officer. As a licensee he was in a unique role with both the privileges and responsibilities of his licence. It was argued that Mr Maynard, with other trainers, had in some way been involved with the same drug quite some years earlier in circumstances which resulted in the testing procedure having been introduced.

Further, senior Counsel submitted to us that this matter is a value judgment for the Stewards and not for the Tribunal. The Stewards had made a finding in that they preferred the conclusion that, as a matter of convenience, Mr Maynard had accepted the advice of his veterinarian rather than have the horse tested and it was open to them to find that the belief was not honest and reasonable in the circumstances. It was not for the Tribunal to substitute its own value judgment for the Stewards as to the reasonableness of the belief.

In reply Mr McCusker QC submitted that it was wrong to say that the Tribunal cannot set aside the value judgment of the Stewards as this was a re-hearing with wide powers vested in the Tribunal to inform itself and not be bound by the value judgment of the Stewards. The real test was whether Mr Maynard held the belief after 14 days. It was argued that the finding cannot stand as there was no evidence to contradict this fact. If this was perceived to be a problem with the Rules, the cure is to amend the Rules.

In order to decide which approach should be adopted it is necessary for the Tribunal to examine the relevant provisions of the Racing Penalties (Appeals) Act 1990 to elicit the nature of the appeal to the Tribunal. The Act states that appeals may be determined by the Tribunal but does not define or prescribe the nature of the appellate process.

Generally, appeals may be of three types:-

* appeals stricto sensu, in which the appeal is limited to determining whether the decision appealed against was reasonable or open to the decision making body on legal grounds, on the evidence before the decision making body;

* appeals by way of re-hearing, in which the appeal body reviews all of the evidence before the decision making body, together with a power to hear further evidence, and may substitute, if necessary, what it believes to be the correct decision for that of the decision making body; and

* appeals de novo, in which the appeal body conducts a fresh or original hearing of the matter, standing in the shoes of the decision making body.

Neither the long title to the Act nor s.13 of the Act, which deals with those appeals which shall be heard, give any clear indication as to the precise manner in which appeals are dealt with. A number of different sections do set out the procedure and the powers in dealing with appeals.

S11(1)(b) obliges the Tribunal to "act according to equity, good conscience and the substantial merits of the case".

S11(3)(e) requires the Tribunal to "make a full and thorough investigation in open court", without regard to legal forms and requirements, and may inform itself of any matter as it thinks fit and admit evidence. Matters relating to the administration of racing known to the Tribunal may also be taken into account. Paragraph (c) of that sub-section also specifies appeals are to be heard and determined "upon the evidence at the original hearing" together with other evidence that may be required or admitted.

S14(1)(a) states that a determination which is taken to be and is given effect to as a determination of the original decision-making body "is final and binding on the parties".

S17(1) empowers the Tribunal to permit an appellant to amend the grounds of appeal at the hearing.

S17(3), (4) and (6) deal with receipt of evidence, power to summons witnesses, inspect documents or places, or generally receive evidence from a variety of sources. S.s(9) gives wide powers to the Tribunal on determination of an appeal including power to make such order as it thinks proper.

The wide powers conferred on the Tribunal in s17 indicate that it is intended that the Tribunal make up its own mind on the issues before it on a rehearing (Horne v Locke [1978] 2 NSWLR 88), and that the Tribunal on such a rehearing may have regard to events occurring after the original decision, in addition to the evidence originally presented (Maritime Services Board v Murray unreported, SC NSW, 22.12.93). The High Court has held that such powers "point irresistibly" to an appeal being by way of a rehearing (Re Coldham; Ex Parte Brideson (1990) 170 CLR 267).

This is generally consistent with the provision of sections 11(3)(c) and 11(3)(e), which provide the clearest indication of the nature of the appeal before the Tribunal.

Difficulty however may be provided by section 11(1)(b) of the Act. An identical provision contained in a legislative appeal procedure very similar to that under the Act, was held to provide "inevitably" for an appeal by way of a hearing de novo (Western Mining Corporation Ltd v Valuer General unreported, SC WA, 15.08.88); although it has also been held to result in an appeal by way of rehearing (Koh v Teachers Appeal Board unreported, SC SA, 22.06.89). The distinction between the two decisions is based upon the special relationship in the latter between the decision making body and the persons coming before it. The Supreme Court indicated that where such a relationship exists elements of policy and discretion are often associated with the decisions made, particularly in relation to disciplinary proceedings, and that in those circumstances it will unlikely that an appeal body is intended to stand in the shoes of the decision making body rather than simply reviewing its decisions by way of a re-hearing.

In Horne v Locke [1978] 2 NSWLR 88 Sheppard J held that an appeal to the Appeals Board constituted under the Government Railways Act 1912 (NSW), with similar provisions to the Act, from a decision of the Public Transport Commissioner in relation to promotions, was by way of a rehearing.

In Strange-Muir v Corrective Services Commission of New South Wales (1986) 5 NSWLR 234 (appeal to Government and Related Employees Appeal Tribunal against decision not to promote employee) the legislation in question had generally similar procedural provisions to the Act but not to the extent of some of the wider provisions of the Act. It was held that the appeal is not limited to whether the prior decision was reasonably open but to review or rehear the evidence before the original decision-maker to determine the objective correctness of the original decision.

After noting that the issue rests ultimately on the terms of the statute granting the appeal, the High Court in Re Coldham; Ex Parte Brideson (supra) held that the following factors "pointed irresistibly" to the conclusion that it was an appeal by way of rehearing:

1. the equivalent of sections 11(3)(c) and 17 of the Act, allowing the Commission to take further evidence for the purposes of the appeal;

2. the equivalent of section 17(9)(e) of the Act, allowing the Commission to make such order as it thinks fit;

3. the nature of the issues before the Commission, being whether prescribed conditions for the registration of organisations of employees had been met;

In general the legislative procedure contained in the Act, the nature of the decisions which are appealed against, together with the relationship of the Tribunal and the original decision-making bodies and that between those decision making bodies and the persons coming before them all point in favour of an appeal to the Tribunal being by way of rehearing.

That being the case, the Tribunal is satisfied that it is empowered by the Act to form its own conclusion as to the reasonableness of the belief of the appellant and that it is not bound by the value judgment of the Stewards. Even although the Stewards did have the advantage of hearing the evidence and observing Mr Maynard during the course of the inquiries which they conducted, the Tribunal does have the benefit of the transcripts of the evidence presented in both inquiries. Further, the Tribunal is guided by the reasoning of the majority in the Full Court in the prerogative writ proceedings involving Mr Maynard.

After analysing the evidence and carefully considering the submissions of senior Counsel, the Tribunal is satisfied that no evidence was produced by the Stewards which could be said to have discharged the onus of proof which rested on them in relation to the defence which was raised regarding Mr Maynard's belief as to the absence of the drug at the time of presenting the horse to race. In other words there was no conflict on the evidence requiring a resolution and in respect of which the Stewards would have been in an advantageous position by having observed Mr Maynard who appeared in person before them. All of the veterinarian opinion at the time, until this incident, supports the reasonableness of the opinion and the approach adopted by the appellant.

The failure by Mr Maynard to avail himself of the pre-race swabbing in the circumstances where he was professionally advised that he was within the safety zone cannot demonstrate any lack of honesty or reasonableness on his part. Clearly it would have been incompatible whilst holding such a belief for Mr Maynard to have resorted to the test.

The Tribunal agrees with the submissions of senior Counsel for Mr Maynard. The defence which was raised is a complete one in the circumstances. Mr Maynard should not have been convicted of a breach of A.R. Rule 175(h)(ii). The appeal is allowed.

DAN MOSSENSON, CHAIRPERSON

FRED ROBINS, MEMBER

PAMELA HOGAN, MEMBER