Appeal decision

Hearing Date: 7 December 2015

Decision Date: 28 June 2016

Code of racing: Harness

Appeal panel: Mr B Miller (Chair), Mr P James and Mr D Kays

Appearances: Mr JE Murdoch QC appeared on behalf of the Appellant Kenneth John Belford and Ms AC Freeman of Counsel appeared on behalf of the Respondent Racing Queensland

Decision being appealed: Breach of (AHRR) Rule 190(1) - Presentation Rule and Disqualification of six (6) months of Appellant's Licence

Appeal result: Appeal upheld

Introduction

The Appellant appeals to the Racing Disciplinary Board ("the Board") in relation to a decision of the Stewards of Racing Queensland made on 8 October 2015 to convict him of a breach of the Australia Harness Racing Rule 190(1) ("AHRR") committed on 29 July 2015, that being that he presented a horse for a race which was not free of prohibited substances.

The Stewards imposed a six (6) months disqualification period upon the Appellant's licence and the Appellant appeals against both the conviction and penalty imposed.

Background

The Appellant holds a trainer's licence under the Australian Harness Racing Rules made under the *Racing Act 2002* ("the Act"). As Trainer, he presented the standard bred mare Hot Tamale to race at Redcliffe on 29 July 2015. A pre-race blood sample was taken from the mare that night.

The Certificate of Analysis (exhibit 4) from the Racing Science Centre ("RSC") records that when tested on 30 July 2015, the sample recorded total plasma carbon dioxide concentration of 37.5mmol/L. The certificate states that the expanded measurement uncertainty for total plasma carbon determinations at the threshold concentration (36.0mmol/L) is 1.0mmol/L at greater than 99.99 confidence.

A second Certificate of Analysis from the Racing Analytical Services Limited ("RASL") (exhibit 12) from analysis of the B sample on 31 July 2015, was 36.6mmol/L.

On 8 October 2015 Stewards completed an inquiry and the Appellant was charged under the AHRR. The charge being as follows, Transcript, page 56: -

> *"On 8 October 2015, Stewards completed an inquiry and Mr Belford was charged under the AHRR. The charge was laid in this form (Tp56):*
>
> > *After giving those matters consideration, Stewards are of the view that a charge pursuant to Rule 190(1) should be laid against you, and that says:*
> >
> > > *"a horse shall be presented for a race free of prohibited substances."*
> >
> > *Section 2 of that rule says:*
> >
> > > *"if a horse is presented for a race otherwise in accordance with sub-rule (1), the Trainer of the horse is guilty of the offence."*
> >
> > *Section 4 of that rule says:*
> >
> > > *"An offence under sub-rule (2) or (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse."*
>
> *Stewards are charging you under rule 190(1), in that as the Trainer of Hot Tamale you presented that mare for racing at Redcliffe on 29 July 2015 when a prerace sample taken from that mare has been found upon analysis to be in excess of the threshold for an alkalinising agent, and that being Rule 188A(2)(a), which defines alkalinising agents to be at a concentration of 36 millimoles per litre in plasma, and anything in excess of that is deemed a prohibited substance."*

Mr Belford pleaded not guilty to the charge.

The Stewards found him guilty and he was disqualified for a period of six (6) months. In this Appeal he challenges the guilty verdict and contends that the penalty was excessive.

Nature of the Appeal

Pursuant to Section 149ZE(3) of the *Racing Act 2002 ("the Act")* an accepted Appeal is to be determined by way of rehearing, unaffected by the appealable decision being appealed against, on the material before the relevant control body for the accepted Appeal and any further evidence allowed by the Constituted Board.

On an accepted Appeal this Board may confirm the appealable decision, vary it or set it aside and substitute it's own decision.

Relevant Rules

Rule 190(1) states that a horse shall be presented for a race free of prohibited substances. If a horse is presented for a race other than in accordance with Rule 190(1), the Trainer of the horse is guilty of an offence. Alkalizing agents when evidenced by TCO_2 present at a concentration of over the prescribed threshold of 36mmol/L in plasma (mmol/per) are prohibited substances.

Rule 191(1) of the Rules states that a Certificate from a blood testing laboratory approved by the controlling body which certifies the presence of a prohibited substance in or on a horse at a particular time is prima facie evidence of the matters certified.

Rule 191(2) states that evidence of a second Certificate of Analysis also certifying the presence of a prohibited substance in the sample together with the first Certificate of Analysis is conclusive evidence of the above.

It is widely accepted that a Rule such as 190(1) of the Rules creates an offence of strict liability.

In other words, the first Certificate of Analysis from the Drug Testing Laboratory establishes prima facie evidence and the second Certificate of Analysis if able to be relied upon together with the first Certificate of Analysis is conclusive evidence.

Evidence and Submissions

At the outset of this Appeal submissions were received from Mr Murdoch appearing for the Appellant and April Freeman of Counsel appearing for the Respondent Racing Queensland. Two Veterinary Surgeons, Dr John Vine and Professor Brynn Hibbert who are renowned experts in their fields were called and each was cross-examined on the reports and evidence of the other and each came to the conclusion that the B sample gives a confirmatory result of the existence of a substance that may be declared a breach of the drug rule. *TCO_2 has a threshold of 36mmol and above that threshold it is deemed to be unacceptable and a breach of the Harness Racing Rules but it must be borne in mind that for a certificate to issue the level must be within the parameters of plus or minus 1mmol?* A reading of 36mmol or under is excepted from these provisions and allowing for the plus or minus 1mmol, therefore to be over 36mmol it has to be 37.1mmol with the threshold being given.

Dr Vine believed that the B sample could be less in the reading then the A sample because of various factors, some of which are travel, heat, pressure or the analytical evaluation or the closure of the tube with the rubber seal does not collapse properly after withdrawal of the needle such that there is a leak. He could not identify any factor which would affect the A sample in a similar way. The A sample measurement is as close as what we could possibly get.

There is no reason why the B sample should be higher than the A sample unless there was an analytical variation that had occurred.

Professor Hibbert did not necessarily agree with the last proposition claiming that in certain circumstances the B sample had shown resilience and a tendency to be higher.

Both parties, Dr Vine and Professor Hibbert, agreed that that was more likely than not the subject of analytical variation.

The horse in question after it tested positive was sent for tests to the University of Queensland and the green amino acid was administered at the University by a Nasal Gastric Tube quickly. The tube was inserted down the nose and into the stomach of the horse and the green amino acid was then effectively poured down immediately into the stomach. In the opinion of both parties this would show an increase in the TCO_2 level. The question is how much?

In the case of this horse prior to the race, the green amino acid was administered in the feed and the alkalizing agent would have been excreted over a period and the rise in the TCO_2 level would have been minimum to say the least.

Measurements shown by the Olympus machine and the Gem 3500 machine cannot be treated with serious consideration. They have not been properly calibrated machines and the results they reflect and return are just not in the proper parameters of the realistic calculations. There is no doubt that green amino acid has been shown to contain something that raises the levels of TCO_2 but just how much it raises that level is a debatable issue. The swab history of the horse (exhibit 16 of the Transcript) shows that the levels of TCO_2 reveal the horse to be in the usual range of thoroughbreds in racing conditions.

Dr Vine's laboratory has not done any tests on green amino and nor does he believe any other laboratory in Australia has. A green amino packet was then tendered which reflected that there was no warning on the packet to either withhold medication at times or to not input it before the race, although there is a 12 hour suggestion before any strenuous exercise.

Both experts called and cross-examined had presented a joint paper concerning TCO_2 measurements in 2011.

A Prohibited Substance

Rule 188A(2)(a) provides that alkalizing agents when evidenced by TCO_2 present or below a concentration of 36.0mmol/L in plasma will be excepted as a prohibited substance for the purposes of sub-rule 1 or Rule 190AA (which is not relevant to this matter).

The operation of Rule 188A(2) therefore is exclusory. For a certificate to be either prima facie or conclusive evidence the reading must be 36.1 or above allowing for a discrepancy of 1mmol/L. In this case the readings were on the first certificate 37.5 and the second

certificate 36.6. Allowing for the level of uncertainty of 1mmol/L the total plasma carbon dioxide concentration could fall to 35.6mmol/L on the second certificate.

This measurement of uncertainty is a matter which may be taken into account in deciding whether to convict a person for presenting a horse with a prohibited substance.

Submission

It has been submitted by Mr Murdoch QC in this Appeal that the following submissions and relevant law apply and we quote as follows: -

"16. As to the correct approach to the application of the measurement uncertainty, reference is made to the following passages from the Decision of Bell J in *Riley v Racing Victoria Ltd* [2015] VSC 527 (1 October 2015):

> *9 The test result reported by one laboratory, Racing Analytical Services Ltd ('RASL'), was that the concentration of TCO_2 in the horse's blood was 37.1 millimoles per litre. On the evidence, that result reflected a base measurement of 37.061 millimoles per litre which the laboratory rounded-up to 37.1 millimoles per litre in accordance with the applicable Australian Standard ('AS2706-2003'). [4] After making an adjustment for measurement uncertainty of 1 millimole per litre in line with Racing Victoria Ltd policy, a reported concentration of 37.1 millimoles per litre would usually be treated as 36.1 millimoles per litre, which is just above the maximum level specified in cl 178C(1)(a).*
>
> *10 The test result reported by the other laboratory, Racing Science Centre ('RSC'), was that the concentration was 36.2 millimoles per litre. After making the same adjustment for measurement uncertainty of 1 millimoles per litre, this concentration would (under the policy) usually be treated as 35.2 millimoles per litre, which is clearly below the maximum level.*
>
> *11. Adjustment for measurement uncertainty is not positively required by the Rules but, quite properly, is adopted as responsible and sound scientific practice. According to the evidence, adjustment in the amount of 1 millimoles per litre is a matter of policy on the part of Racing Victoria (and the other codes of racing). <u>The policy was adopted in about 2007.</u>*

17. The report of Professor D Brynn Hibbert, an expert in the field of analytical chemistry, opines as follows:

> *The results of the analysis of the initial (A-sample by RSC) and the reserve (B-sample by RASL) samples are of equal quality. There is no evidence to suggest that either should be preferred. The difference between the samples is within a reasonable statistical probability. Therefore each result gives comparable information about the blood taken from Hot Tamale on 29 July 2015.*

18. Professor Hibbert also expresses the expert opinion that:

    Given the measurement uncertainty of the results (u=0.22mmol/L, a result of 36.6mmol/L or more has a statistical probability of 1/313 of coming from a horse with a true value of 36mmol/L.

19. The sampling and analysis methodology assumes that blood samples taken within a short time have the same TCO_2, and that if properly stored and transported the true values of samples will still be representative of the blood TCO_2 at the time of sampling. Refer paragraph 22 of Professor Hibbet's report.

20. With the benefit of this evidence from Professor Hibbert the Board should, I submit, treat the results of the B sample analysis as a negative result. As such it contradicts the positive result from sample A.

21. This reasoning was adopted by member Favell at QCAT in the matter of *Lambourn –v-Racing Queensland Ltd* [2013] QCAT 699 (6 September 2013). In that case the unadjusted TCO_2 certificate results were:

    RSC 37.1mmol/L
    ARFL 35.9mmol/L

22. The second result was treated as contradictory of the first and, therefore the verdict was one of not guilty. Such an outcome was consistent with the caution which needs to be applied in testing the evidence relied on by the prosecution in disciplinary matters which can result in serious impacts on the livelihoods of licensees. The approach taken by the member in Lambourn was consistent with the reasoning applied by Justice Bell in the recent Victorian Supreme Court case *Riley-v-Racing Victoria*: see for example in para [71] where Justice Bell used the expression *"competing certificates"*.

27. The decision of the Supreme Court of Victoria in *Riley-v-Racing Victoria* in relation to the equivalent rules in thoroughbred racing confirms that under the rules the excepted levels are 36mmol/L or less. See para [72].

28. Further, in *Riley-v-Racing Victoria*, the decision explains the practice of adjusting for measurement uncertainty.

30. AHRR191(2) contemplates that a positive result from the first laboratory will be "confirmed" by the second laboratory.

31. In this case, far from confirming the RSC result, the RASL result contradicts the RSC result. The former is positive; the latter includes a negative result within the range of measurement uncertainty.

32. The need for confirmation, of a positive swab, by a second laboratory is to be found in the history of flaws in testing outcomes which have been revealed during the sixty year

history of swabbing racing horses in Australia. For example, the so called “caffeine crisis” in Queensland racing in the 1980’s was belatedly found to be attributable to the erroneous use of caffeine contaminated testing strips in the Queensland laboratory.

33. Likewise the relatively recent case of McCarthy2, in NSW harness racing, provides a further example of scientific peculiarities which can arise in the swabbing of racehorses. These mattes underscore the importance of not relying on one only laboratory certificate. Confirmation of a positive result, by a clear positive result from a second laboratory is essential to the integrity of the testing regime.

34. Faced with the conflicting result from the RASL, the tribunal could not, we submit, be satisfied on the requisite standard that there was an infringement of AHHR190 by Mr Belford.”

It appears to this Board that if the Stewards and Racing Queensland are to rely on the strict liability provisions then conclusive evidence is not present unless the second certificate is over 36mmol/L when adjusted for the degree of uncertainty. This is not the case here and as such we have only prima facie evidence and not conclusive evidence of the charge from the two certificates.

Bearing in mind the case law quoted and the other circumstances already referred to we uphold the Appeal herein.

Further right of appeal information: The Appellant and the Steward may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **28 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au