

# RACING APPEALS TRIBUNAL

## QUEENSLAND

### NOTICE OF DECISION

**APPEAL NO:** RH003-08

**DATE:** 27 November 2008

**APPELLANT:** Mr David John Litzow

**RESPONDENT:** Queensland Harness Racing Board

**APPEAL FROM:** Appeal from the decision of the Stewards to impose a penalty of 3 months disqualification for a breach of Rule 231(1). Appeal against penalty only.

**BREACH OF RULE:** Rule 231(1)

**DECISION:** Appeal upheld and penalty varied to 3 months suspension from 28 October 2008 with suspension period after one month to be wholly suspended for 12 months pending no further breaches of the Rules relating to misconduct by the Appellant.

**APPEARANCES:** Mr David Keane of Counsel appeared on behalf of the Appellant.

Mr A W Duffy of Counsel instructed by Schweikert Lawyers appeared on behalf of the Respondent.

### REASONS FOR DECISION

Mr Brock Miller - Deputy Chairman

Mr Dennis Standfield - Member

On the Sunday morning of the 12<sup>th</sup> of October 2008 at the Marburg Showgrounds, there was an altercation between the Appellant and another Licensee, Mr Darryl Graham. There were trials held that morning by the Marburg Trotting Association and the altercation between the Licensees was such that the Association's President, Mr Russell Lehman referred the matter to the Stewards.

The Stewards held an Inquiry on the 28<sup>th</sup> of October 2008 and after hearing evidence the Stewards laid a charge against the Appellant for breaching Harness Racing Rule 231(1) which states:

*“Rule 231(1)*

*A person shall not threaten, harass, intimidate, abuse, assault, or otherwise interfere improperly with anyone employed, engaged or participating in the Harness Racing Industry or otherwise have a connection with it.”*

The particulars stated by the Stewards when laying the charge was the Appellant harassed, intimidated, abuse and assaulted Mr Graham at the Marburg Showgrounds on Sunday morning, 12 October.

At the hearing both Counsel for the Appellant and Counsel for the Respondent presented written submissions for which the Tribunal is grateful.

While the Appellant initially pleaded not guilty when he was charged at the Stewards Inquiry, the Appellant now does plead guilty to the extent as stated in paragraph 1.2 of the Appellant's written submissions, namely:

*“...that there was a finding that the Appellant had a verbal argument, exchanged pushes and tossed a rug at Mr Graham...”*

With the Appellant now not disputing a breach of the Rule and this matter proceeding on the basis of appeal on penalty only, the matter of being “denied justice” as was stated on the Appellant's Appeal Notice, is no longer relevant. The Tribunal does state that it is of the view there was no basis for the Appellant to complain of any denial of natural justice or the manner in which the Stewards conducted the Inquiry.

The Respondent disputes the facts on which the Appellant now pleads guilty and states from the evidence taken at the Stewards Inquiry that the Appellant did assault Mr Graham by throwing a punch at him and the altercation was more than “pushing and shoving and the throwing of a rug”.

As is often the case when there are altercations between persons there is varying evidence as to what did occur. This matter is no exception. At the Inquiry, evidence was presented by Mr Darryl Graham of the actions of the Appellant against him which is stated in the Steward Inquiry Transcript (“SIT”) at page 2 from line 42 as follows:

*“Then he pushed me. I had my driving glasses on the top of my head, and then he struck me on the side of my head. My glasses fell off. So I reached back down and picked them up and then he got a rug and threw the rug over me, and then he walked back up and hopped on his horse.”*

Mr Lehman’s evidence at the Inquiry (SIT page 8 from line 1) was:

*“Like, I say, I can’t hear what they were saying because I was a fair way away, and then I seen David hop over the fence and go over to Darryl and they sort of started pushing and shoving, and David looked like he threw a punch or whatever, and then he went to walk away and picked up a rug and threw it at Darryl. And that’s all I seen.”*

The evidence presented by driver, Mr Bruce Newham (SIT page 12 from line 37) was:-

*“...I was sort of behind so I couldn’t sort of see but there was a bit of pushing and shoving from Mr Litzow.”*

Mr McDougal was the Clerk of the Course at the Trials and his evidence was given to the Stewards by telephone at the Inquiry and was as follows (SIT page 25 from line 3):

*“THE CHAIRMAN: From your point of view, Mr McDougal, what did you see?”*

*MR MCDUGAL: I seen – I was hanging onto a horse. I seen everything. I know Darryl, I seen Scrubber picked up a rug and threw it at Darryl. He never threw it on him but he threw it at him. That’s all that happened. I was sort of hanging on to a horse just up above them. So, yeah, that’s – I know they were having words.*

*THE CHAIRMAN: All right. So you didn’t see any physical contact between the two gentlemen?”*

*MR MCDUGAL: No, sir. I never seen anything like that. They were both having words, and that was it, more or less.*

*THE CHAIRMAN: All right. Any questions first from Mr Graham to Mr McDougal?”*

*MR GRAHAM: No.*

*THE CHAIRMAN: No questions there. Mr Litzow, any questions of Mr McDougal?*

*MR LITZOW: Yes. Brad was there – it has been alleged that there was a punch thrown or a punch thrown on my behalf. Did you see any punches thrown at all between myself and Mr Graham?*

*MR MCDOUGAL: No. I didn't see any punches.*

*MR LITZOW: And you saw the whole incident, did you?*

*MR MCDOUGAL: Yes, I was hanging on to your house at the rail."*

The Appellant for his part specifically denies throwing a punch, stating to the Stewards (SIT page 3 from Line 11):

*"...We've had a minor argument, and that's about it. There was no punches thrown..."*

As to the two witnesses who stated that they observed the full incident, Mr Lehman stated that he was "*probably a hundred metres*" away (SIT page 8 line 9) and Mr McDougal stated that he was "*maybe 30 or 20 metres away*" (SIT page 28 line 9). While both were clear on their evidence, it is hard to reconcile that one stated there was a punch thrown and the other stated that there was not.

It is noted that the Inquiry was 16 days after the incident and it may be that both witnesses recollections became unclear during that time. Whatever the reason there is a variance in the evidence and given the seriousness of the charge, the Tribunal is of the opinion that it cannot sustain the finding that there was a punch thrown by the Appellant. Certainly there was pushing and shoving and the throwing of the rug and Mr Litzow was the instigator of those actions. The Tribunal finds that this is the extent of the Appellant's actions for sustaining a breach of Rule 231(1).

As to an appropriate penalty, Mr Keane's submissions were that there were mitigating circumstances as the actions by the Appellant were "spur of the moment". The Tribunal finds this hard to accept. It is clear that the Appellant approached Mr Graham and while he may have been offended by a remark made by Mr Graham, he should not have reacted as he did. Mr Keane further states that there had been a death in the Appellant's family and the Appellant was anxious to leave the track to comfort his sister in law. It may well be that this was a reason why the Appellant behaved the way he did towards a fellow Licensee.

The Appellant is a hobby driver with his primary source of income from a bread run and he supports his family from the bread run. While he does have ambitions of being primarily involved with harness racing, it is unfortunate that he finds himself in this position through his actions on the day. There is simply no reason why a Licensee should “push and shove” or “throw a rug” at another Licensee. While thankfully the incident did not occur in the presence of members of the public, the fact that Mr Lehman did report it to the Stewards does show it was serious and was concerned about the incident.

The Tribunal is of the view that this is an appropriate matter where the Appellant should be suspended and there should also be a condition that he behaves himself by not having further breaches of the Rules. The Tribunal makes the following orders:

1. Appeal upheld.
2. Penalty varied to 3 months suspension from 28 October 2008 with suspension period after 1 month to be wholly suspended for 12 months pending no further breaches of the Rules relating to misconduct by the Appellant.
3. Appeal deposit fee be refunded to the Appellant.

Mr Brock Miller .....  
Deputy Chairman

Mr Dennis Standfield .....  
Member