

RACING APPEALS TRIBUNAL

QUEENSLAND

NOTICE OF DECISION

APPEAL NUMBER: RT026-08 (Amended)
DATE: 24 October 2008
APPELLANT: **LES ROSS**
RESPONDENT: Queensland Racing
APPEAL FROM: Decision of the Queensland Racing Stewards to disqualify licensed trainer Les Ross for a period of 6 months found guilty of a breach of AR178(a)
BREACH OF RULE: AR178
DECISION: Appeal dismissed.
APPEARANCES: Mr J E Murdoch SC instructed by Paul Carter from Southern Gold Coast Lawyers appeared on behalf of the Appellant.
Mr A J MacSporran SC instructed by Patrick Murphy Solicitor, appeared on behalf of the Respondent.

REASONS FOR TRIBUNAL'S DECISION

Mr Leo Williams AO – Chairman
Mr Brockwell Miller – Deputy Chairman
Mr Dennis Standfield – Member

On 13 August 2008 registered trainer, Les Ross, presented a horse **Pinelope** for racing at Eagle Farm. A pre-race blood sample was taken by the Queensland Racing Veterinary Surgery, Dr Lenz, assisted by Ms Warwick. On subsequent analysis it was found to contain the prohibited substance, TC02, at a level exceeding that allowed by the Rules of Racing.

The QR stewards opened an inquiry on 26 August which subsequently lasted for 4 days of hearings. Finally, on 26 September, the Stewards charged and convicted Ross of a breach of Rule 178 which provides:

“When any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be punished.”

The Stewards disqualified Ross for 6 months. Ross appealed the conviction and penalty to this Tribunal.

During the 4 days of the hearings, numerous issues were canvassed in evidence, all of which is contained in the written transcript. Many of the matters raised were not specifically relevant to the charge or the penalty imposed. The appeal was heard by the Tribunal on the basis of the extensive record and the 59 Exhibits attached to it, with the approval of both Senior Counsel appearing for the Appellant, Mr J E Murdoch SC, and the Respondent, Mr A MacSporran SC.

The grounds on which Mr Murdoch SC argued the appeal were that the Certificates of Analysis confirming the presence of the TC02 were inadmissible because the collection procedures mandated by the Racing Animal Welfare and Integrity Board were not complied with. Mr Murdoch SC also argued that execution of the sample security document was not compliant with the procedures. Additionally, Mr Murdoch argued that the identification requirements of the horse required to be observed by the QR Vet, Dr Lenz, were not followed as provided in QR policy pursuant to the *Racing Act*.

The effect of the Rules of Racing in respect of presentation of horses with prohibited substances in their systems is that the person who presented the horse (with a prohibited

substance in it) is guilty of an offence no matter how the substance found its way into the horse's system.

This reversal of the common law notion of onus of proof requires that any preconditions and procedures used to establish the presence of prohibited substances are complied with. This Tribunal has said many times that non-compliance with such is not good enough to sustain a conviction.

The facts of this case, as best they can be distilled from the available evidence and as this Tribunal finds them, were that the trainer, Ross, attended the races with 4 horses accompanied by 3 people. Two of the people were described as "foremen" namely, Cameron Partington and Brad Berwick. The third was a young man named David Kehoe who had travelled with the others to the course. He was a trackwork stablehand but not at that time employed by Ross although he had previously been so. When the party arrived at the course, Kehoe led one of the horses from the float to the stalls, spent time in the vicinity of the horses and led one or more of Ross's horses into the enclosure.

It is Kehoe's status that Mr Murdoch SC questions in his argument about non-compliance with the procedures.

At the time the Vet, Dr Lenz, and the collection official, Ms Warwick, arrived to collect the pre-race blood sample from Pinelope, Kehoe was with Berwick in the stall area where the horses are stabled and which is cordoned off from the public.

On arrival, Dr Lenz asked the foreman, Berwick, for the horse's papers so that he might identify it. Berwick's evidence was that he went to the race bag in the stalls to look for them but could not find them. Apparently while this was in progress the Vet took the blood sample while the horse was being held by Kehoe. Kehoe said in evidence that he observed the collection. By the time Berwick came back a few minutes later the sample had been taken and the acknowledgement form had been signed by Kehoe. The trainer, Ross, was absent, having gone to fetch the saddle but arrived back as the procedure was being completed.

The other foreman, Partington, also arrived back before the Vet left and also went to the bag to look for the papers. Berwick told the Vet he could not find the papers and the Vet replied that the horse could be identified by his brands and markings which he would do and which he said he subsequently did.

The evidence from Dr Lenz was not long on detail but there is no valid reason to either disbelieve him or refuse to accept what he said.

The evidence on the identification of the horse was:

“Dr Lenz: Yes. The sample was one of, I think, six or so that were taken on the day. It was in the middle or so of the race meeting that we got around to this particular horse. We, from memory, took the sample in the tie-up stall, myself and the SCO. The Taking of the sample was very routine. The horse was well behaved. I took a sample and it was then packaged, as the normal procedure.

The Chairman: Regarding the identification of the horse, we believe the papers may not have been there, or were you given papers, or who identified the horse?

Dr Lenz: Yes. All horses are identified and we either work off the papers, if they are available; failing that we have the SCO's copy of the Brands and Markings sheet that horses are identified against.

The Chairman: So on this occasion were you aware whether there were papers or whether you had to identify it off the Brands and Markings that you would have had with you?

Dr Lenz: I couldn't recall exactly, but yes, if the papers for whatever reason are not presented, we fall back on the Brands and Markings sheet.

The Chairman: That's a routine that you do. How many blood samples would you take a week, considering you go to five racing meetings?

Dr Lenz: It varies, but certainly in the dozens per week.

The Chairman: And that's your normal protocol, to identify the horse off the Brands and Markings if there are no papers?

Dr Lenz: Yes. My first port of call is always the horse's papers, but if they're not available – and there are varying reasons for that – we do fall back on the Brands and Markings sheet.

The Chairman: So on this occasion did that take place?

Dr Lenz: I can't quite recall whether that particular horse had papers or not. But if it didn't, we would have taken the Brands and Markings off the sheet.

The Chairman: You were satisfied when you took that sample and the paperwork was done that the sample you took was from the horse ----

Dr Lenz: Yep.

The Chairman: ---- that the paperwork showed?

Dr Lenz: Yes. Very much so. Yes is the answer to your question." (Transcript, p 43, Line 1- p. 44, line 4)

On the actual taking of the sample his evidence was:

"The Chairman: But there was someone there that you believed was working for Mr Ross at the time who witnessed the sample.

Dr Lenz: Yes. Yes." (Transcript, p47, lines 6-9)

Further,

"Mr Hackett: Dr Lenz, do you believe Mr Ross was aware that the horse was being sampled?

Dr Lenz: It's obvious that the sample was being taken, because you are sticking a needle in the neck and obtaining vials from the horse. I don't specifically recall letting you personally know, but my impression was that certainly your – you know, the person that I found in charge of the horse was aware of what was going on.

Mr Ross: So the person in charge of the horse would be a witness to everything?

Dr Lenz: Yeah. It gets a little bit grey, because we have – you know, when the horses are sampled, sometimes the actual strapper signs the papers, but he – they are required to witness it and so on.

Mr Ross: In that case the strapper signed it, not the person in charge.

Dr Lenz: Well, in that case I guess the strapper is the person in charge as far as the paperwork is concerned." (Transcript, p 47, line 32 – p 48, line 7)

The other evidence establishes that at one time or another all of Ross, Berwick, Partington and Kehoe were around the horse during the time the Vet was collecting or packaging the

sample and putting it in the containers. Kehoe gave evidence that he witnessed the procedure and signed the "Sample Security Document for Taking a Sample for Analysis" Protocol No 265476.

He completed his name in para 11 which reads

"I, DAVE KEHOE, witnessed the whole process of collecting the sample placing it in 1 or more containers and sealing the container or containers."

He certified by signing the original form. The information in items 1 to 5 (and, for a blood sample, item 6) and items 7, 8 and 9 is correct.

Kehoe collected the pink copy of the form from the Vet and later handed it to Partington who took it and put it in the horse's folder. None of Ross, Partington or Berwick questioned the procedure or Kehoe's participation until after the positive was returned.

The appellant's strong argument was that Kehoe was not "in charge:" of the horse at the time the sample was taken. Mr Murdoch's submissions were:

16. Essentially, the Appellant challenges the adequacy of compliance with the procedures for the taking of and handling of the sample of blood from Pinelope.
17. Appendix 3, which deals with the procedures to be used when collecting a sample of blood from a horse contains the following introductory words:

"A registered veterinary surgeon must collect blood samples.
Advise the person in charge of the licensed animal to watch the sample collection procedures carefully."
18. The Appellant submits that there is insufficient evidence capable of establishing that the Kehoe was the "person in charge" of Pinelope at the relevant time or that he was advised by Dr Lenz to watch the sample collection procedures carefully.
19. The evidence is clear that Kehoe did watch the sample collection procedure carefully."

It is the view of this Tribunal that an overly strict interpretation of the term, “person in charge”, within the framework of the Rules and protocols is not sustainable. It seems clear that during the course of any normal day at the races there would be more than one person “in charge of” the horse at different times. The reasonable interpretation to give the phrase depends on the situation at the relevant time.

Mr MacSporran SC submitted the ordinary meaning of “in charge” is to have the care or supervision of”. It is not reasonable to contend subsequently that Kehoe was not “in charge of” the horse when the trainer and his foremen for one reason or another had absented themselves and left the horse with Kehoe in an area where only licensees and staff are permitted.

It was also argued that Kehoe had not been specifically advised to carefully watch the sample collection procedures as stated in the collection procedures booklet. The purpose of the heading in Appendix 3 of the booklet is to ensure that the collection is observed. The only real evidence about this is by inference from what Dr Lenz said and the admissions of Kehoe himself, both in evidence and in writing. There is no affirmative evidence that neither Dr Lenz or Ms Warwick failed to comply with the requirement if that indeed is what it is in the preamble to Appendix 3.

The Tribunal considers that the evidence shows that the Stewards were correct in finding that Kehoe was in charge of the horse and that Kehoe was properly advised by the Vet.

In the absence of other adequate evidence, the Tribunal also accepts that Dr Lenz did properly identify the horse.

It follows from these findings that the certificates as to the prohibited substance in the horse are admissible and that the conviction was correctly arrived at on the evidence adduced before the Stewards.

The other grounds in the Notice of Appeal are not sustainable on the evidence.

That leaves the question of the penalty of 6 months' disqualification. The Tribunal is mindful of its various previous decisions on like offences and of the arguments of relatively clean history and the argument about family circumstances advanced on behalf of the appellant.

The Tribunal considers a disqualification of 6 months is appropriate. The Tribunal disallows the appeal on penalty, and disqualifies the Appellant for 6 months,

The Tribunal orders that the disqualification shall commence at midnight on 2 November next.

The deposit is forfeit.

Leo Williams AO
Chairman

Brockwell Miller
Deputy Chairman

Dennis Standfield
Member
