

TASMANIAN RACING APPEAL BOARD

Appeal No 06 of 2023-24

Panel:	Mr Patrick O'Halloran	Appellant:	Mr Dylan Ford
Advisor:	Mr Mike Stiles		
Appearances:	Mr Neil Finnigan (on behalf of the Stewards) Mr Adrian Hall (on behalf of the appellant)	Rules:	AHRR 168(1)(e) Improper driving
Heard at:	Prospect Government Offices 171 Westbury Road PROSPECT TAS	Penalty:	Suspension of 3 Tasmanian race dates
Date:	8 November 2023	Result:	Upheld

REASONS FOR DECISION

1. The appellant was the driver of Lynyrd Skynyrd NZ in (what was the last race of the evening) Race 9 of the Launceston Pacing Club meeting on 3 September 2023.
2. Following representations made to them on 3 September 2023 by Gareth Rattray, who had been the driver of Young Rooster in Race 9, Stewards held an Inquiry into the appellant's conduct in that race on 17 and 24 September 2023.
3. Within the Steward's inquiry they heard from drivers Dylan Ford and Gareth Rattray and reviewed the available race footage and 'photos' (more properly described as stills) taken from that footage.
4. Following the inquiry into his drive Stewards found that the appellant had breached Australian Harness Racing Rule 168(1)(e). Such rule provides:

A person shall not before, during or after a race drive in a manner which is in the opinion of the Stewards :-

.....

(e) improper.

5. Within the inquiry held on 24 September 2023 Stewards provided that the particulars of the breach were *'that at or about the 150 metre mark your movement in the sulky resulted in contact to the sulky shaft of Mr Rattray's sulky. Not for a long period of time and we acknowledge in the particulars that there was no course of deviation with Mr Rattray's horse, he kept a straight course at that point in time. The improper portion is the fact that the Stewards are alleging at this point that there was contact with your arm, or your hand, to the sulky shaft'*.
6. The appellant plead not guilty and provided that *'I just think that photos just, if that photo could show my hand I would sit here and probably say guilty. But I don't think that photo can show that it is my hand or my foot. I still believe that it is my foot on top of my footrest*

and when I released under Gareth's sulky (inaudible) advance, I think that's what becomes the image'.

7. At the conclusion of the inquiry Stewards found the appellant guilty and imposed a suspension of his driver's licence for three race meetings.
8. On 28 September 2023 the appellant filed an appeal against conviction and penalty. The appellant was granted a stay of penalty pending the determination of this appeal.
9. Within the 'Notice and Grounds of Appeal' the appellant provided:
 - a. with reference to the particularised physical interaction that he - *'did not make contact with another Driver's sulky, therefore I do not believe that the charge of improper driving is valid'* - and *'I am not guilty of the charge as there was no contact so there is no improper driving to answer to'*
 - b. with reference to the totality of the evidence provided at the inquiry and the witness Rattray - *'This witness in this matter has attempted, on numerous occasions, to change his statement, therefore he would not be deemed a reliable witness'*.
 - c. In reference to the penalty imposed he provided *'The penalty attempting to be imposed is excessive in relation to the historical charges'*.
10. The appellant, represented by Mr Hall for the appeal, sought leave to amend the grounds of appeal, to:
 - a. *Ground 1 – (That) no panel of stewards properly instructed as to the law could have made the finding of guilt.*
 - b. *Ground 2 – The penalty was manifestly excessive*
11. Within the hearing of this appeal no objection was raised to the proposed amendments and this Board subsequently granted leave to amend the grounds as sought.
12. Whilst submissions were made within the appeal regarding the particulars of the breach as laid no separate ground of purported error was argued or pursued by the appellant within this appeal.
13. Within his submission to this Board in regard to Ground 1, as to what was meant by 'the law', Mr Hall made submission which mirrored those made to the Board in Appeal No 04 of 2023-24 at paragraphs 20 and 21. Those submissions included:
 - a. [20] Mr Hall referred the Board to the Tasmanian Racing Appeal Board decision of Collins, being appeal number 3 of 2019/2020, which addressed both the standard of proof and what constitute improper conduct. The case noted the standard of proof in these matters was outlined in the Victorian Racing Appeals and Disciplinary Board case of Oliver (30 October 2017), page 2, as follows:

The Standard of Proof is that laid down in the well known case of Briginshaw v Briginshaw. We must be comfortably satisfied that the charge has been proved, taking into account inter alia, the gravity of the charge and the consequences which flow from the conviction.
 - b. [21] Bowman J in that case further noted that 'improper riding involved an element of deliberate or conscious conduct, which creates a danger or a potential for danger'. The Board in Collins was also referred to the NSW Racing Appeals Tribunal case of Morris (9 August 2016) with respect to the same charge, which expressly noted that the *Briginshaw* standards of proof is to be met in such cases, and there is discussion

of what constitutes improper driving, which notes that ‘the word “improper” contains within it a failure, not just to reach a standard but reach it with some sort of mental element’.

14. In furtherance of the argument contained within Ground 1 it was submitted on behalf of the Appellant that the reliability of the witness Rattray was negatively impacted in consideration:
 - a. That within the formal inquiry held on 17 September 2023 when asked directly by Stewards as to whether the appellant touched his sulky – Rattray provided that he would have to look at the film before he could speak to the allegation;
 - b. That even after being shown the relevant race footage he didn’t conclusively assert any recollection of the actions occurring in the manner particularised by the stewards and at best remained equivocal as to what the nature of the interaction between the appellant and his sulky was;
 - c. That the lack of consistency in his narrative was so pronounced that it caused the Chairman himself within the hearing on 17 September 2023 to observe:
 - i. his *‘evidence today compared to what it was on the night is way off beam’* and that *‘we expect you to just confirm what you’ve told us’* –
 - ii. *‘No just the other night you said Mr Rattray you were adamant on the night that it did happen. Are you still sure that it did happen after looking at the films? ...I cant see it properly’*
15. It was submitted by the appellant that these observations were relevant as it highlighted the contrast in what Rattray was prepared to say within a formal inquiry to the stewards (on 17 September 2023) to the content of, and manner in which he made, his initial report to Stewards on 3 September 2023.
16. The appellant further submitted that such equivocation and lack of reliability was in direct contrast to Mr Ford who, also with the benefit of being shown the race footage and photos in the inquiry with Rattray, maintained over the two dates on which the inquiry was held that he definitely didn’t touch (Rattrays’) sulky.
17. With such equivocation of Rattray’s evidence within the Steward inquiry, the necessary caution and care to be applied to any eye witness accounts, the context in which the breach was said to have occurred and the lack of assistance the race footage provided to support the Stewards charge (i.e. that it was not at all conclusive of the manner of the actions) it was ultimately submitted by the Appellant that the Board could not be comfortably satisfied that the particularised actions said to have been completed by the appellant had occurred.
18. Within the hearing of this appeal, it was submitted on behalf of the Stewards that:
 - a. Regard should be had to the contemporaneous account and reporting of the matter made by Rattray to Stewards on 3 September 2023 where he had been adamant that the appellant had acted in the way they ultimately particularised
 - b. That within the Stewards inquiry on 17 September 2023 that Rattray’s account was broadly consistent with that initial account
 - c. That the race footage supported the charge as particularised
19. The Board observes that it did not have the benefit of a record of the precise details of the content of first disclosure said to have been made by Rattray on 3 September 2023.
20. Noting the primacy of importance the race footage took within the Stewards inquiry the Board viewed with great scrutiny the race footage and whilst doing so had the benefit of the assistance of the harness racing adviser, Mr Stiles in relation to that footage and all other material relied upon within the appeal.
21. Having carefully scrutinised all submissions made by both parties, the transcript of inquiry and the race footage - with specific reference to the laid particulars - the Board is not

comfortably satisfied that there was contact with the appellants arm or his hand to the sulky shaft - and as such cannot be satisfied to the requisite level of satisfaction that the appellant had breached rule 168(1)(e).

22. The appeal against conviction is upheld and the orders of the Stewards are quashed per s 34(1)(a) *Racing Regulations Act 2004*. Accordingly, there remains no need to consider the separate but related ground of appeal regarding penalty.

23. As the decision of the Stewards has been quashed, the Board orders pursuant to ss34(2)(e) *Racing Regulations Act 2004* that the appellant's prescribed deposit be refunded in full.

DATED: 28 May 2024.