

# TASMANIAN RACING APPEAL BOARD

Appeal No. 11 of 2019/20

<b>Panel:</b>	<b>Kate Cuthbertson (Chair) Wendy Kennedy (Member) Rod Lester (Member)</b>	<b>Appellant:</b>	<b>Adrian Collins</b>
<b>Adviser:</b>	<b>Mike Stiles</b>		
<b>Appearances:</b>	<b>Anthony O'Connell (on behalf of the Appellant) Steven Shinn (on behalf of the Stewards)</b>	<b>Rules:</b>	<b>AHRR 149 (2)</b>
<b>Heard at:</b>	<b>By Videoconference</b>	<b>Penalty:</b>	<b>Suspension for 10 Tasmanian race meetings</b>
<b>Date:</b>	<b>27 April 2020</b>	<b>Result:</b>	<b>Appeal against conviction dismissed Penalty varied to suspension for 5 Tasmanian race meetings</b>

## REASONS FOR DECISION

1. The appellant was the driver of *Rocknroll Music* in Race 4 En Vogue Modelling Academy Stakes 2180m on 23 February 2020 at the Burnie Harness Racing Club. Following in inquiry into his drive which was held over 2 days on 23 February and 1 March 2020, the Stewards found that the appellant had breached AHRR 149(2) which provides:

*A person shall not drive in a manner which in the opinion of the Stewards is unacceptable.*

2. The particulars of the charge were as follows:

*The details of this charge are that in the opinion of the Stewards your drive was unacceptable in that when it was clear that you were the position outside the leader was unavailable to you. Early in the race you persisted to drive your horse essentially flat out for approximately a lap. This being on a long shot, out of form, \$61 horse and that your drive has resulted in your horse commencing to give ground and from a lap out and as I said finishing in excess of 80 metres from the winner.*

3. The appellant pleaded not guilty to the charge. Following the inquiry he was found guilty by Stewards and his licence was suspended for 10 race meetings.
4. This appeal relates both to the conviction and penalty imposed. The appellant was granted a stay of the suspension pending the determination of the appeal.

### **Conviction Appeal**

5. During the inquiry, Stewards heard evidence from the appellant and the trainer of *Rocknroll Music*, Ben Yole. A good deal of the inquiry process involved Stewards and the appellant engaging in debates about what occurred which, in the main, did not result in further evidence of substance being adduced or the appellant making any meaningful concessions about his drive. As a consequence of the repetitive nature of the questioning by Stewards and the explanations provided by the appellant it has not been necessary to refer to the entirety of the evidence given by the appellant during the inquiry for the purposes of these reasons.
6. At the commencement of the inquiry, the Chairman of Stewards put the following proposition to the appellant:

*CHAIRMAN: Mr Collins the Stewards are curious about your driving tactics in this race. We had been told by Mr Yole when he gave his multiple runners that he said that put it into the race at some stage. He began reasonably, worked forward, come in the first turn, Mr Ashwood was in the death outside the leader with No Real Diamond, you got up to his outside, it appeared that Mr Ashwood, you could see clearly that he was indicating to you that he wasn't going to let you go, you could see that on the film and live. However you had a go trying to get by him, Mr Ashwood's continuing to tip his horse up. It would appear that at no stage was he going to give away that position, you've just appeared to continue to guide your horse forward but you've gone at least a lap while you're doing this, you've done it from leaving the back straight the first time until just prior to coming into the straight a lap later, alright so this has gone on for nearly 700 metres somewhere around there. Ultimately both your horse and his horse have tired very badly, beaten somewhere around 80 metres I believe.*

*MR BROWN: 86.*

*CHAIRMAN: 86 metres. Alright can you explain your drive to us Mr Collins?*

7. The appellant initially responded prior to watching the race patrol film as follows:

*Without the benefit of watching the film sir, off memory my horse was ODS I believe, came off a rocket as far as I was concerned a bit better than fairly. Anyway so Mr Yole just said like he didn't say a lot before I got in the cart,*

*just try and obtain forward<sup>1</sup> position, put her in the race you know, big one paced horse. So began really well, landed somewhere in the vicinity outside Mr Ashwood, I momentarily tried to ease to get a spot in behind him, that spot was closed by Mr Gareth Rattray let to go, at that point then I was in no man's land so on a big one pace horse, rather than drag him back to last I elected to drive for a spot outside the leader which at one point I was, my wheel was outside Mr Ashwood's legs, I didn't deem Mr Ashwood a death seat horse. Correct me if I'm wrong but I think it might have been first up last start beaten 40 odd metres. My horse had had a pattern of racing forward before and yeah I was, after we went so far I was almost like in excess of Mr Ashwood that's why I couldn't believe why he's still driving with his tippy toes to hold a spot. At the same time he detrimenting his own horse and mine. Then I don't know whereabouts on the film, I was under the assumption I should drive for another I reckon 50 metres further than I wanted to try and open up the gap so I could slide back in behind which eventuated. And with the being beaten my horse did tire, certainly did but I found myself behind held up behind Mr Ashwood in the top of the straight the last time and was only beaten a metre by him so yeah and my horse had raced New Norfolk cup, sat outside the leader, this was no New Norfolk cup but just as I said and just for the fact that he went away so well and I knew Mr Ashwood's horse had no form holding the breeze and I like I said I caught in no man's land, I had no other option to go forward other than drag all the way back and when I was obliged to run in behind him I was pretty angry yeah.*

He provided further explanation for his manner of driving during the course of the inquiry, including the following:

*... I just sensed the field was bunching and by the time I was going to anchor it was just going to be a long way back and after we began so well, like in hindsight now I would have, if I had my time over again I would have pressed on from the outset without, I wouldn't have took my momentum and tried to get in behind Mr Ashwood.*

8. On the first day of the inquiry, Stewards advised that they had already spoken with Mr Ashwood who said that he had clearly indicated to the appellant three or four times that he was not going to let the appellant go. The appellant inquired whether that was by driving with his whip and then told Stewards that he did not recall that and that he had indicated to Mr Ashwood that he was going to keep pressing on too.
9. After viewing the film, the appellant accepted that Mr Ashwood had been driving his horse along with his whip and gave the following further evidence:

*Yep, as I said because he hung me out to dry I had to try and increase the tempo of the race for an extra 50 metres so I could oblige myself the run in behind. Like in my experience that there is let the outside horse go every day of the week, especially in my view and my form, that he's on a sit sprinter.*

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<sup>1</sup> The transcript recorded that the appellant said "four position", but all parties accepted this was a transcription error and should have read "forward".

*Regardless there's been plenty of, you talk about (inaudible) which I don't bet but there's been plenty of you know false favourites go round in my view.*

10. When the inquiry resumed in March 2020, the appellant gave the following evidence:

*MR. COLLINS: Right so I'll go right from the beginning. I was ODS up the top of the track, first time I've driven the horse, the horse began to my surprise reasonably quickly right?*

...

*Yep alright so where I've landed right my initial objective of driving the horse is to get him away, to tick off a back in the draw thing for Mr Yole. Right he's gone away good, when the tugs go back I'm like off the front but off the second row, top of the track gone away. I got one of them good I'm looking to just dodge traffic, I don't want to run into anyone right. So then where I've landed is forward, still out wide on the track but to the outside of Mr Ashwood. At that time he's driving with his whip, right, so I'm assuming he's wanting to obtain a forward position. I've checked my horse and tried to drop in behind, which is clear as anything on the film right. At that point Elect To Go has booted up, held me out no spot there right so I become in no man's land. It's evident to me that the leader I believe Tuxedo Max is still in front right, not like Mr Ashwood's sitting at his girth, well I mean even every race you go round in if the death horse is sitting at the leaders wheel and then they want to boot up when people comes, that should be questions asked of them right.*

...

*I wasn't looking to go to the breeze myself at that stage. I'm looking to obtain a run inside him. At that stage I thought he was just wanting to hold a forward spot, might have even been trying to dive behind the leader. I do agree he had his whip out but ...*

*CHAIRMAN: Oh you do, ok.*

*MR COLLINS: Yeah I do agree with that but I don't agree that it was a message to me*

11. The appellant also acknowledged from viewing the film that he could see that Mr Ashwood looked across at him and uses his whip even more before tapping up.
12. Mr Yole attended the inquiry at the appellant's request. The appellant asked him what his opinion was of his drive and whether he agreed with Stewards that he went for a full lap challenging a spot outside the leader. It is apparent from the transcript of the inquiry that Mr Yole viewed the film of the incident and stated as follows:

MR YOLE: *As my evidence on the day I think you began very well for the horse, began like a rocket, he's already up there. Here you've lost your momentum because you've tried to check back and get into a position which is I feel is the right thing to do on the horse. That there is now not going to happen because Mr Rattray's been able to boot up enough to keep you out and then you've pressed forward trying to get a position outside the leader, it's very hard when you go back to last around Burnie on a one paced horse.*

...

*Yeah I think you can both agree with that because they've taken out the first bit after you've grabbed hold to try and get in, yeah.*

...

*Yeah so whether he hasn't been good enough or yeah had too hard a run out there, it's very hard you know but how long, do you go back to last, it's a tricky situation.*

...

*He probably began too well that's the problem.*

MR COLLINS: *Yeah.*

MR YOLE: *And the wrong person in the death.*

13. Mr Yole was also questioned by Stewards who asked him:

*Alright then, Mr Yole would you have thought going into this race that if your horse had the run that he had through the early and middle stages of the race, would you have believed that he would have been able to sustain his run and keep going after the way he was driven in that first lap and a half?*

14. Mr Yole's response was:

*Well no but I think he was a victim of circumstance, I don't think any horse can sit three deep and that's, you're never going to win that argument. But whether it's a victim of circumstance that put them in that position.*

15. Following consideration of the evidence, Stewards found the appellant guilty of the charge.

### **The Appellant's Notice of Appeal & Submissions**

16. In his notice of appeal, the appellant stated that he maintained that the view of Stewards that his drive was unacceptable was flawed "*as my actions during the race were reasonable given the circumstances which presented on the day*".
17. Before the Board, the appellant submitted that the nature of the Burnie track had a part to play in the way that the race developed. It was described as a tight track with straights of only 97 metres. As a consequence, the track's

bias favours horses racing forward; it is a difficult track for back markers to win on.

18. Reference was made to the trainer's driver tactics which had been disclosed, namely to put *Rocknroll Music* into the race at some stage. This statement given by Mr Yole was not challenged during the course of the inquiry. The appellant, as a consequence, submitted that he had a mindset that he needed to race in the forward position.
19. The appellant referred to *Rocknroll Music's* form. It was noted that in previous races it had raced outside the leader. On 17 January 2020 it raced outside the leader taking the 3 wide position early before moving forward. On 1 January 2020 it had raced outside the leader throughout. A review of its form noted that in four races it had raced in a position outside the leader. On two occasions it had been driven on the peg line, but this was attributed to the draw.
20. In respect of its previous race on 26 January 2020 it had been beaten by a 171m margin resulted in it being stood down for 10 days and a requirement to undergo a trial. The appellant submitted that race was a fast class race over a longer distance. It was noted that it was quite common to let a horse adjust stride for its welfare towards the end of the race.
21. It was further submitted that the Stewards had erred in assessing *Real Diamond's* form. The appellant's assessment, which was conveyed during the course of the inquiry, was that *Real Diamond* was a "sit sprinter". It was submitted that it was not a death seat horse and that this was a reasonable view based on its previous form. It was submitted that *Real Diamond* had not been driven during the course of the race the subject of this appeal by Mr Ashwood in a manner that was consistent with its exposed form.
22. In the circumstances, it was submitted that it was not unreasonable for the appellant to take *Rocknroll Music* forward and that an analysis of its form supported this approach. In summary, it was submitted that the appellant's decision was explicable taking into account the trainer's instructions to race forward and put himself in the race, the bias of the Burnie track, that Mr Ashwood's horse was not a death seat horse (by reference to its form) and *Rocknroll Music's* previous pattern of racing forward.
23. On that basis it was stated that the appellant's approach to the race was not blameworthy or culpable and therefore did not meet the description of unacceptable driving.
24. As noted above, Mr Ashwood was also questioned by Stewards as to his drive. He was not charged. It was submitted on behalf of the appellant that it would have been better to have held both inquiries together, although the failure to do so was not relied on as a particular basis upon which to disturb the decision. It is clear, however, from the transcript that Stewards gave the appellant ample opportunity to call witnesses and provided the appellant with a summary of what Mr Ashwood had stated to them about the race. It

was clearly open to the appellant to call Mr Ashwood to challenge his version of the race as conveyed by Stewards if he wanted to do so.

25. The appellant also pointed to the absence of evidence of sectional times to support the opinion of Stewards. It is to be noted that no sectional times were relied upon by the appellant during the course of the hearing of this appeal.
26. It was submitted that the appellant was obliged to drive the horse in the manner he did to give it the best possible chance to win. That it was a \$61 horse did not absolve the appellant of the requirement to drive the horse to win or obtain the best possible place.
27. The race patrol film was viewed and the appellant provided submissions regarding his interpretation of the conduct of the race. Ultimately, he argued that with all the information before him, he drove his horse in a manner that was trying to do the best for the horse and that it was the actions of Mr Ashwood that prevented him from doing that. It was submitted that the position was always there for him to take and it was reasonable for him to attempt to obtain it. On his version, the challenge went for 200m, not the 600 or so metres asserted by the Stewards. The ultimate finishing position was influenced by the fact that *Rocknroll Music* was giving ground and, further, had been held up by Mr Ashwood's drive at the 400m mark.

#### **Stewards' Submissions**

28. Stewards submitted that their case was as described in the transcript of the inquiry. It was clear to Stewards that Mr Ashwood had indicated to the appellant in the first 100m when he turned his whip over that he intended to maintain his position. It was in that context that it was said that the appellant elected to go forward. In their view, Mr Ashwood again indicated that he was not willing to give up the line by looking across to the appellant and continuing to use his whip. In those circumstances, the appellant was presented with a couple of options: first, he could have restrained *Rocknroll Music*; and secondly, he could have taken a position to the rear of Mr Ashwood's drive. It was noted that the winner came from a position further back in the field.
29. Instead, it was submitted that the appellant chose to essentially "go flat out" for approximately 600m in spite of Mr Ashwood indicating he was not prepared to give up his position.
30. In those circumstances there was no advantage in being in the lead and it was not a position that was reasonably available to the appellant. In trying to move forward into the death seat, the appellant had "used up all the petrol" and had nothing left with 600m left to travel. In those circumstances, Stewards formed the view that the drive was unacceptable.
31. In terms of the horse's form, Stewards did not accept that *Real Diamond* was a sit sprinter. It was noted that the horse had won three races from the lead.

32. By contrast *Rocknroll Music's* recent form was not good at all. The way the horse was driven over the first lap and a bit was not reflective of its form. Although the Stewards' opinion did not turn on the horses' relative odds of winning, it was noted that there was a clear disparity which was reflective of the form and ought to have informed the appellant's approach to the race.

### **Rule 149(2)**

33. This rule is not concerned with mere errors of judgment or split second mistakes. The approach to be taken has been summarised by Judge Williams sitting in the Victorian Racing Appeals Tribunal in *Misfud v Racing Victoria Stewards* [2007] VRAT 6, where he stated as follows:

*"This rule is not intended to penalise what might be described as mere errors of judgment or split second mistakes. The Tribunal is well aware of the authority constituted by the previous decision in 1983 by Judge Goran in the case of Honan where it was thought desirable to bring into focus the sort of considerations that lie behind rules such as rule 149(1) and (2) and Judge Goran made a number of observations.*

*It is certainly relevant to restate here that the first, second and fourth of the observations that he made apply. I will read those:*

*'(a) the rule does not permit the mere substitution of the Stewards' view as to how a particular horse should have been ridden for the view of the rider'*

*Of course in the harness racing world we would substitute 'driven for the view of the driver':*

*'(b) the rule does not seek to punish a mere error of judgment during the race on the part of the driver; and*

*(d) the driver's conduct must be culpable in the sense that it objectively judged it is found to be blameworthy.'*

...

*Perhaps to throw my own interpretation into the mix I might view it this way, that the sort of culpable action that is required to amount to a breach of this rule might be such that in normal circumstances a reasonable and knowledgeable harness racing spectator might be expected to exclaim with words to the effect, 'what on earth is he doing?' or 'my goodness look at that' or some such exclamation."*

34. Notably, r.149(2) refers to "*the opinion of the Stewards*". In this jurisdiction, where an appeal is in the nature of a rehearing to be heard and determined upon the evidence of the original hearing subject to any other evidence admitted pursuant to s.30(6B) of the *Racing Regulation Act 2004*, the question for the Board is whether it is comfortably satisfied that the appellant's drive was unacceptable.

## Consideration

35. The Board has carefully considered the race film. It was viewed several times in the presence of the parties to the appeal. The Board also had the assistance of an adviser, Mr Stiles. In our view, the manner of driving disclosed by a close consideration of the race film supports the conclusion that the appellant's drive was unacceptable. It is apparent that the appellant commenced his challenge to Mr Ashwood and his drive in the front straight. It is clear that he had to drive his horse hard in order to gain ground on Mr Ashwood's drive. In the early stages when the appellant commenced moving forward in the three wide line, approaching Mr Ashwood's drive, it appears there was a position behind Mr Ashwood and an opportunity for the appellant to come back.
36. It was, however, abundantly clear that Mr Ashwood was not giving up his position and gave several indications of that, by both the use of the whip and by looking over towards the appellant.
37. The attempt to gain the forward position was not a short lived one, but lasted for a considerable period of time. In light of *Rocknroll Music's* previous form, which had included losing by a significant margin in its previous race and being stood down for a period before a trial, this was unacceptable. Even taking into account the unforgiving nature of the Burnie track and the assertion that horses rarely win from behind (which was not what in fact happened in this race), the appellant did not properly explain why he tried to get ahead in the circumstances and not take the opportunity to get a sit. In the Board's view, he attempted to gain the forward position for far too long given his horse's form.
38. In the circumstances, the Board is comfortably satisfied that the appellant's manner of driving in the race as identified by Stewards was unacceptable.

## Appeal against Penalty

39. When delivering the decision on penalty, Stewards stated as follows:

*...we have considered in a matter of penalty your record which is excellent. Stewards certainly don't hold anything against you in regard to the way you conducted yourself during this inquiry. We think that you had every right to defend yourself in the way that you have. We've taken on board that this isn't your principal form of income. The normal penalty starting point would be 12 race meetings, however we feel that taking your record into account, of course you did plead not guilty so we can't give you any dispensation for that, however we do consider your record is excellent so we've cut off two meetings there. So the suspension will be a ten race meeting suspension. That's the two less than normal*

40. There were two aspects to the appellant's submissions on penalty. First, it was submitted that the starting point of 12 race dates was too high considering that AHRR 149(2) was a less serious charge than a breach of AHRR 149(1). It was pointed out that Stewards had recently imposed an

eight race meeting penalty for a breach of the more serious rule. Secondly, it was submitted that the effect of COVID-19 on the industry ought be taken into account when assessing the impact of any penalty imposed. Reference was made to decisions of the Victorian Racing Tribunal and Harness Racing Victoria's recent determination to amend the penalty structure to reflect the impact of suspensions due to the post-COVID-19 regionalised nature of racing as demonstrating an approach to the imposition of penalties that factored these unprecedented times into account. It was submitted that a suspension of effectively a month in circumstances where the appellant has not been able to earn income from racing at all because of the suspension of racing is a matter that has some part to play in determining an appropriate penalty.

41. Stewards submitted that they approached the issue of penalty in this case from the starting point that a 6 week suspension is generally appropriate which in turn translates in Tasmanian racing terms to approximately 12 race meetings. This position was said to be guided by precedents in other matters including the following recent determinations:
  - a. February 2020 - 12 race date suspension to Mr Walters;
  - b. Also February 2020 - 5 race date suspension in the context of "under-driving"; and
  - c. May 2019 - 21 race date penalty imposed against Mr Hill.
42. Stewards did, however, accept to an extent that it may be appropriate to take into account that times have changed since they originally imposed their penalty. Effectively they stated they would not be against the imposition of a penalty that was reflective of the change in circumstances. Nevertheless, it was their submission that any penalty was still required to give effect to the aims of personal and general deterrence. Ultimately, their submission was that the 10 meeting suspension they imposed at the time was correct. Stewards left it open to the Board to consider ameliorating that penalty in light of the influence of COVID-19 on the racing industry in general.
43. Little was disclosed about the appellant's circumstances from the transcript of the inquiry. Further submissions were made during the course of the appeal. As noted, Stewards took into account that the appellant had not previously been found guilty of a breach of this rule. The Board was provided with a copy of the appellant's offence report. That report discloses previous suspensions in respect of careless driving and interference offences. The appellant has also had one previous suspension for a breach of AHRR 149(1) which is the more serious rule. That was imposed on 4 February 2014 and the appellant was suspended for 13 days. The appellant's offence report also demonstrates that the appellant has been driving since 1994.
44. The appellant's driving is not his sole source of income. He has a full-time job as a road maintenance worker and the Board was not told that his work had been affected by COVID-19. Nevertheless, the appellant's income from driving forms an important part of his budget.

45. As is well known, racing in all codes has been suspended since 2 April 2020. Currently, the Tasmanian Government's *"Roadmap to Recovery"* is anticipating a resumption of racing activities from 13 June 2020 subject to a review and risk assessment by Public Health. It is not clear whether all codes of racing will resume at that time or if there will be any restrictions as to how that racing occurs. It may be that there will be fewer opportunities for drivers such as the appellant to obtain drives.
46. We accept that a fine would not be an appropriate penalty in the circumstances. This is for two reasons:
- (a) it would not appropriately mark the seriousness of the offence; and
  - (b) the appellant's circumstances are likely to have been affected by the cessation of racing during COVID-19 to make such a penalty inappropriate.
47. In our view, a suspension for the period of 5 race days is the appropriate penalty to impose in the circumstances. The Board is of the view that such a penalty is both reflective of the appellant's record, the circumstances of the race and takes into account the effect of the cessation of racing activities due to COVID-19.
48. The decision to suspend the appellant for 10 Tasmanian race dates is varied to a suspension for 5 Tasmanian race dates.
49. The decision of Stewards having been varied, the Board orders pursuant to ss.34(1A), (2), (4A) and (4B) of the Racing Regulation Act 2004 that 25% of the appellant's prescribed deposit is forfeited to the Secretary of the Department and that the appellant pay 25% of the cost incurred in the preparation of the transcript of the Stewards' inquiry.