2 September 2024

**RACING VICTORIA**

**and**

**DARREN WEIR**

**and**

**JARROD McLEAN**

**and**

**TYSON KERMOND**

**Date of hearing:** 5 July 2024

**Date of decision:** 2 September 2024

**Panel:** His Honour John Bowman (Chairperson), Her Honour Kathryn Kings (Deputy Chairperson) and Mr Des Gleeson.

**Appearances:** Mr Angus Willoughby of Counsel appeared on behalf of the Stewards.

Mr Ian Hill KC with Mr Matthew Stirling of Counsel appeared on behalf of Mr Weir.

Mr Damian Sheales of Counsel appeared on behalf of Mr McLean and Mr Kermond.

**Charges and particulars:** Reference is made to the list of charges set out in the Tribunal decisions of 24 April 2024 and 5 July 2024.

**Pleas:** Mr Darren Weir – Not Guilty to Charges 1, 2 and 3

Guilty to all other Charges

Mr Jarrod McLean and Mr Tyson Kermond – Not Guilty to Charges 1, 2, 3 and 10

Guilty to all other Charges

**DECISION – CLARIFICATION OF PENALTIES**

Issues have arisen as to the commencement date of and calculation of the penalties outlined in our decision of 5 July 2024. We shall deal with these matters in turn.

**1. The penalty decision in the case of Mr Darren Weir**.

The penalty imposed on Mr Weir was one of disqualification for two years. This was over and above the period of disqualification for four years imposed by the Racing Appeals Tribunal on 6 February 2019, that being for possession of the “jiggers”, the electronic devices. It was in fact an agreed penalty and one which was approved by the Tribunal.

Mr Weir served those four years of disqualification. They terminated on 7 February 2023. It being a disqualification, Mr Weir was prohibited from preparing, racing or training horses or receiving any direct or indirect financial benefit from thoroughbred racing or breeding. No such horses could even be on his property. He could not attend race meetings. Disqualification and warning off are the most severe penalties that can be imposed.

We agree with the submission on behalf of the Stewards that this period of disqualification ended on 7 February 2023, and that since then Mr Weir has been unlicensed. That has permitted him to carry out very considerable pre-training and spelling operations at his property and employing a substantial number of persons to do this. In other words, he has not applied for a trainer’s licence, but has been able to carry on a large enterprise relating to thoroughbred horses. This has been with the knowledge of the Stewards and it is not suggested in any way that it was in breach of the Rules.

By the same token, the period from the end of disqualification on 7 February 2023 to date cannot be seen as a period of penalty. Mr Weir made no application to be relicensed and has not been so. Very successfully, he has carried out an operation involving the preparation and spelling of thoroughbreds.

What then are the principals of totality of sentencing and secondly how do they operate in the present case of Mr Weir, bearing in mind the submissions more recently made?

In relation to the general application and operation of totality in criminal cases, McHugh J stated the following in Postiglione v The Queen 189 CLR 295 at 308:

“… the court adjusts the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the reality of the sentences.

Put another way, when an offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behaviour. There should be an overall sentence that balances appropriately the severity of the combined sentences so that such overall sentences reflect the scope of the offender’s action and is fair in light of the entire criminal conduct”.

Reference is made to decisions such as The Queen v Sgroi (1989) 40 A Crim R 197 and The Queen v Janceski [2005] NSW CCA 288. The principle of concurrency can be applicable to fines – see The Queen v Sgroi (1989) 40 A Crim R 197.

Thus, in the criminal law the principle of totality is essential – one of overall fairness that is appropriate in the circumstances.

Whilst the above is a very brief summary of totality, in the context of the criminal law, it seems to us that the principals involved are applicable to the current situation involving Mr Weir. A separate penalty should be imposed in relation to each charge to which a plea of guilty is made, but the overall total, by way of total or partial concurrencies, should be a penalty that is just and appropriate.

We turn now to the findings which we made on penalty for the individual charges, and we bear in mind the submissions recently made. Charges 4, 5 and 6 each concern a breach of AR 231(2)(a) in respect of a relevant horse, the sequence being Red Cardinal, Tosen Basil and Yogi. The essence of each Charge is the use of an electronic device capable of affecting the performance of a horse.

It was and remains our opinion that the Charges pursuant to AR 231(2)(a), whilst serious, should not be the principal Charges for the purpose of the imposition of penalties.

Charges 7, 8 and 9, and particularly Charge 8, seemed to us to be the appropriate head Charges.

It was our opinion that Mr Weir, having served an agreed and imposed penalty of disqualification for four years for possession of the jigger or jiggers, should serve an additional and separate penalty of disqualification for two years for the use of it or them and that such period of disqualification effectively should commence immediately.

That remains our opinion. Unlike the cases of Mr McLean and Mr Kermond, no slip or overlooking occurred in the imposition of penalties on 5 July 2024. Accordingly, that penalty of disqualification for two years remains in place.

We shall hear the parties as to the precise starting date.

**2. The penalty decision in the case of Mr Jarrod McLean.**

The penalty imposed on Mr McLean was disqualification for a period of 18 months. The commencement date and effective duration of the period of disqualification still to be served, if any, are issues.

We say at the outset that, in handing down the decision on penalty in relation to Mr McLean, the Tribunal made a slip or error. It was stated that Mr McLean had not served any relevant time by way of penalty prior to the handing down of the penalty in the present case. That is true in relation to the handing down of any penalty by this Tribunal. It is incorrect as a more sweeping statement.

We accept that Mr McLean was suspended by the Stewards pursuant to AR 23 as of 10 October 2019 and that such suspension was to remain in place until the conclusion of the criminal charge or charges being conducted in the Magistrates’ Court. That conclusion occurred on 14 December 2022.

We also take into account the letter sent by Racing Victoria Limited to Mr McLean on 11 October 2019. This informed Mr McLean of the suspension from 10 October referred to above and included the following:

“… the Stewards confirm that to the extent any further penalties are imposed upon you by the Victorian Racing Tribunal (VRT) at a later stage with respect to the same conduct underlying the matters the subject of charges for indictable criminal offences against you by Victoria Police, the Stewards will submit to the VRT that any period of suspension served by you in accordance with the limited Orders ought be a matter taken into consideration in determining those further penalties”.

A similar letter was sent to Mr Tyson Kermond. We accept that the potential period of suspension referred to above is that served by Mr McLean in effect between 11 October 2019 and the completion of the hearing of the Charges in the Magistrates Court (14 December 2022).

The Stewards have accepted that these periods of suspension imposed on Messrs McLean and Kermond “….may be taken into account in the evaluation of the just and appropriate penalty to be imposed on them” – see paragraph 11 of the submissions of 9 August 2024.

On behalf of the Stewards, it is further submitted that it would be erroneous to treat disqualification (as imposed by this Tribunal on 5 July 2024) and suspension (as served by Mr McLean between 11 October 2019 and 14 December 2022) as identical penalties. It is submitted that the two cannot be treated as like-for-like when quantifying appropriate penalties.

We agree. There is a clear distinction between suspension and disqualification. Disqualification is a more stern and restrictive penalty. Without going through the differences, there is no argument but that disqualification is considerably more severe. For example, thoroughbred horses would have to be moved and the disqualified person cannot attend race tracks.

As submitted by the Stewards, the allowance for suspension in the present case is not a simple mathematical calculation. The period of suspension between 11 October 2019 and 14 December 2022 cannot automatically be treated effectively as a period of disqualification and taken into account accordingly.

We will take that period of suspension into account. We refer again to the letter of the Stewards of 11 October 2019 which contained details of the imposition of the suspension. In accordance with it, the period of suspension will be “taken into account” in determining the further penalties.

There is a clear distinction between “taken into account” and, for example, “completely offset against”. The distinction between suspension and disqualification is important.

However, we do not agree with the submission of the Stewards that, effectively, the entire prospective periods of disqualification already imposed should remain in place.

In our opinion, and in accordance with the letter of the Stewards of 11 October 2019, the period of suspension should be taken into account in determining and imposing the present penalty.

Furthermore, that “taking into account” need not be a complete or precise mathematical allowance in respect of the penalty already served for the relevant offence or offences. That is not what is stated. There is a clear distinction between suspension and the considerably more severe penalty of disqualification.

We previously disqualified Mr McLean for a period of 18 months. We now take into account that he was suspended from 11 October 2019 until 14 December 2022. We are of the view that the fair and reasonable adjustment, taking all relevant matters into account, is the off setting of a period of disqualification of 9 months, or 50%, of the 18 month penalty.

The remaining prospective disqualification penalty of 9 months is imposed. That is pursuant to the Order of this Tribunal made on 5 July 2024. The starting date of such penalty, including whether or not it has already commenced, will need to be clarified.

**3. The penalty decision in the case of Mr Tyson Kermond**

The above observations and findings in relation to Mr Jarrod McLean are also applicable in the case of Mr Tyson Kermond. We shall not go through them in detail again.

Suffice to say that the error made in relation to Mr McLean of overlooking the earlier suspension was also made in relation to Mr Kermond. That is so even if it was not a clearly stated error, as in Mr McLean’s case. The presumption of there having been no relevant earlier suspension or disqualification was made, even if it was not specifically stated.

Mr Kermond had also been suspended by the Stewards (without there being any involvement of the Tribunal) from 11 October 2019 until 14 December 2022. This was not “taken into account”.

We repeat the observations made in relation to Mr McLean and the meaning of “taken into account” as set out by the Stewards in the relevant correspondence.

Given the clear distinction between suspension and disqualification, including the greater gravity of disqualification and the level of consequences and restrictions which flow from it, we are again of the view that the correct approach is not to treat “taken into account” as meaning a complete off-setting of the relevant suspension time served. An allowance should be made, but not a complete off-setting.

As in the case of Mr McLean, we are again of the opinion that an allowance of 50% of the penalty which we imposed on 5 July 2024 should be taken into account – in other words, the period of disqualification should be reduced by 50% to accommodate that “taking into account”.

Accordingly, the period of disqualification which should be served by Mr Kermond is fixed at three months.

**4. Conclusion**

The periods of disqualification now to be served are as follows:

Mr Weir – 2 years

Mr McLean – 9 months

Mr Kermond – 3 months

In the cases of Mr McLean and Mr Kermond, the balance of the penalties earlier and wrongfully imposed is treated as time already served as a result of the “taken into account” process.

We shall hear from the parties as to the starting dates of penalties.

Mark Howard

Registrar, Victorian Racing Tribunal