

RACING NEW SOUTH WALES

APPEAL PANEL

Monday, 5 September 2016

MR R BEASLEY SC — PRINCIPAL MEMBER

MR R CLUGSTON

MR J FLETCHER

IN THE MATTER OF THE APPEAL OF ROBERT CLEMENT

Appearances: Mr P O'Sullivan, solicitor, for the Appellant

Mr M Van Gestel, Chairman of Stewards, for Racing NSW

Date of Hearing: 5 September 2016

Date of Decision 5 Septmeber 2016

REASONS FOR DECISION

PRINCIPAL MEMBER: These are the Panel's reasons for decision in the appeal of Robert Clement.

1. On 28 April 2013 the racehorse Prussian Secret won the Tamworth Cup at Tamworth Racecourse. It was trained by Mr Cody Morgan.
2. Two weeks later Prussian Secret was due to run in the Gunnedah Cup. At some stage prior to this a police investigation had commenced in relation to, amongst other things, the handling of that horse. The New South Wales Racing Stewards conducted their own inquiry on 6 December 2013 and subsequently on 27 July 2016.

3. On the later date Mr Cody Morgan pleaded guilty to causing Prussian Secret to be drenched on the days of the Tamworth and Gunnedah Cups. He admitted asking Mr Robert Clement, the appellant in this appeal, to give a race day drench to Prussian Secret on 28 April 2013, being the day of the Tamworth Cup carnival.
4. Mr Clement was subsequently charged with a breach of AR 64G(1)(a), which is in the following terms:

AR 64G(1) No person without the permission of the Stewards may stomach-tube, attempt to stomach-tube, cause to be stomach-tubed or be party to the stomach-tubing of a horse within 24 hours of the appointed starting of:

(a) a race in which it is engaged to be run; or

...

For the purposes of this rule “stomach-tube” or variations of that term means any application to a horse of a naso-gastric tube.

5. For the purpose of these reasons when the Panel uses the term “drench” it is referring to the term “stomach-tubing” in that rule as read.
6. The particulars of the charge against Mr Clement were:

“The details of the charge under AR 64G(1)(a) being that you, Mr Robert Clement, did stomach-tube Prussian Secret within 24 hours of the appointed starting time of a race in which that horse was engaged to be run as:

- (a) *Mr Cody Morgan, licensed trainer of Prussian Secret, asked you to stomach-tube Prussian Secret on 28 April 2013, being the day that it was engaged to run in the 2TM/92.9 Tamworth Cup conducted at Tamworth Racecourse;*
- (b) *You breached AR 64G(1)(a), as you stomach-tubed Prussian Secret on 28 April 2013, being the day that it was engaged to run in the 2TM/92.9 Tamworth Cup conducted at Tamworth Racecourse, with the amino acid drench that Mr Cody Morgan had purchased and provided to you.”*

7. Mr Clement was found guilty of that charge by the Stewards and disqualified for 12 months. He appeals against conviction to this Panel.
8. Mr Clement, through his legal counsel Mr Paul O'Sullivan, has made some admissions about this matter.
9. First, he agrees that he reached an agreement with Mr Morgan on 27 April 2013 that he would drench Prussian Secret on the day of the Tamworth Cup; secondly, he is a man capable of administering drenches, including on his own and has done so many times; thirdly, he drove a car and horse float to the Morgan property on the day of the Tamworth Cup, coming from the races; fourthly, he took the drench material left for him by Mr Morgan to the stable where Prussian Secret was stabled; fifthly, he went to the stables; sixthly, he then return to the Tamworth races.
10. What Mr Clement denies is administering the drench to Prussian Secret. He says that he instead buried the drench material in sand at the stable complex. His evidence is that he was physically incapable of administering the drench as he had burnt his hands and legs in a scrub fire the night before. He was concerned that he might hurt the horse if he tried to administer the drench and could even make it bleed.
11. Exhibit B on the appeal was the transcript of various phone conversations between Mr Clement and Cody Morgan and also between Mr Clement and his wife. Transcripts were available as a result of a police warrant.
12. In a call on 27 April 2013 at about 6.16pm the Panel was taken to the transcript whereby the agreement was made between Mr Clement and Mr Morgan that a drench would be administered to the horse on the day of the Tamworth Cup.
13. On 28 April 2013 another phone conversation took place between Mr Clement and Mr Morgan at about 12.50pm. Mr Morgan said during the course of that

conversation (at page 14 of exhibit B) that he would be at the Morgan property within 15 minutes or so and that he was leaving then.

- 14 At 1.38pm on 28 April 2013 Mr Clement had a phone conversation with his wife while he was apparently driving back to the racecourse from the Morgan property. He said, "I'll be there in ten" during the course of that conversation.
15. At about 5.39pm on 28 April 2013 Mr Morgan and Mr Clement had another conversation, during which the following was said:

"V2 (Mr Morgan): Hey but about um between you and I like you have to give the drench a tick wouldn't you, a pass?

V1 (Mr Clement): Oh, well I think so and, that's what ...

*V2: Well you know why? You know why? Because I'll tell you why.
Because ...*

V1: He never stopped when he hit the front.

V2: That's number 2. Number 1 was where he was in the run trucking.

V1: Yeah, yeah. Yep.

V2: You know and that's - look tell me if I'm wrong Clemo. It just must take the lactic acid pain away.

V1: It does but I don't think it, I don't think in the run as much, but when he hit the front of the top of the lane ...

V2: It was over.

V1: I knew they would never run him down.

V2: Yeah, yeah, yeah.

V1: You know what I mean? Because and that's when I came from round the front round to you, because I just knew they wouldn't run him down, you know what I mean?"

16. Mr Van Gestel submitted that this call is clear corroborative evidence that Mr Clement had administered the drench to Prussian Secret.

17. Mr Clement says that he only went along with what Mr Morgan said about the drench or at least that was his intention. It was Mr Morgan's idea to give the drench and he did not want to burst his bubble. He had also not told Mr Morgan he could not and had not administered the drench at the time as he did not want to "let Mr Morgan down". Mr Morgan was a friend, who had suffered some leg injury and had no one else who could administer the drench.
18. Mr Van Gestel also submitted that the evidence suggests that Mr Clement may have been at the Morgan property on 28 April 2013 for up to 28 minutes, which is a long period of time had he only disposed of the drench and not administered it. Mr Clement says he was at the property for only about 10 minutes.
19. This issue of time is not necessarily decisive but the Panel would deal with it.
20. It is the fact that Mr Clement spoke to Mr Morgan at 12.50pm. He was at the Tamworth Racecourse at the time. He said he was leaving then.
21. It is a fact that Mr Clement spoke to his wife at 1.38pm while driving from Morgan property back to the races. He said he would be "about 10 minutes."
22. It is about 20 kilometres from the Tamworth Racecourse to the Morgan property. Mr Clement's evidence is that about 5 kilometres of this is restricted to 50 or 60 kilometre an hour streets.
23. In relation to the 12.50pm phone call Mr Clement's evidence was that, while he said he was leaving straight away, he actually had to find a girl called Jamie Lee to assist him in closing up the horse float. After finding her and getting to the vehicle to drive once he was ready, Mr Clement said initially that could have taken him 5 minutes. Subsequently he said perhaps 15 minutes.
24. In relation to the call to his wife at 1.38pm the reference to 10 minutes in Mr Clement's evidence was "a turn of phrase."

25. We find that it was probably about a 20 minute drive from the racecourse to the Morgan property. Mr Clement probably arrived at around 1.10 or 1.15pm. He probably left around 1.30. The Panel thinks it is likely he was there between about 15 and 20 minutes. He might only have been there for 10 minutes. He might have been there for as long as 25 minutes. There is no way of precisely knowing. In the Panel's view, either way, this is enough time for an experienced person like Mr Clement to administer the drench. The issue is whether he did.
26. Before indicating our decision we state two matters.
27. First, we have been told that Mr Clement has been found guilty of an offence under the *Crimes Amendment (Cheating and Gambling) Act* by a jury concerning matters relating to Prussian Secret. We have paid no regard to that decision-making and have based our decision only on the evidence before the Panel. Secondly, the Panel has reminded itself that the Stewards bear the onus of proof and the standard is balance of probabilities, but with what is termed the "*Briginshaw gloss*". We must be comfortably satisfied Mr Clement has breached the rule he has been charged under and found guilty by the Stewards.
28. Mr O'Sullivan says that the Stewards have not proved their case and the evidence falls well short of that which would enable the Panel to be comfortably satisfied of his client's guilt. He said his client is the only person who knows if he drenched Prussian Secret as there were no witnesses. He says the Panel should accept that his client's injuries from the fire the night before rendered him incapable of administering the drench on 28 April 2013. Mr O'Sullivan also reminded the Panel that about 11 months after the Tamworth Cup Mr Clement told Mr Morgan that he had not drenched the horse.
29. The Panel makes the following findings, some of which are admitted.
30. Mr Clement agreed to administer a drench in a conversation with Mr Morgan on 27 April 2013 to Prussian Secret on the day of the Tamworth Cup.

31. On 28 April 2013 he drove from the racecourse to the Morgan property. He took the drench and some equipment and carried them to the stables where Prussian Secret was. He was at the property probably between about 15 to 25 minutes. This is enough time to administer a drench.
32. He then returned to the racecourse.
33. He had been burnt in a fire the night before, had injuries to his hands and legs, but was not so severely burnt that he needed attention from a medical practitioner or from a hospital. His injuries did not prevent him going to the races the following day or from driving a vehicle.
34. In a phone call on the night of 28 April 2013 Mr Clement actively in the Panel's view "talked up" the benefits and effectiveness of the drench to Mr Morgan.
35. All of this evidence in the Panel's view leads us to the conclusion that Mr Clement did administer a race drench to Prussian Secret on 28 April 2013. We are comfortably satisfied that he did and he is, therefore, guilty of the breach of AR 64G(1)(a) as charged. We consider it unlikely in the extreme if Mr Clement was incapable of drenching his friend's horse, as agreed, that he would not have told Mr Morgan that he could not drench it. Further, we find it highly unlikely if he had not drenched the horse that he would have been so adamant about its benefits to Mr Morgan after the race.
36. The formal orders of the Panel are:
 - (1) Appeal against finding of guilt made by the Stewards dismissed.
 - (2) Finding of guilt made the Stewards confirmed.
 - (3) The penalty of 12 months disqualification imposed by Stewards confirmed. Such disqualification to commence on 27 July 2016 and to expire on 26 July 2017.

(4) Appeal deposit to be forfeited.
