

Appeal decision

Hearing date: 27 July 2015

Decision date: 26 November 2015

Code of racing: Greyhound

Appeal panel: Mr Brock Miller (Chair), Mr Paul James and Mr Daryl Kays

Appearances: Mr A. D Scott, counsel appeared on behalf of the Appellant Mr Tracey Kunde
Mr D R Kent QC appeared on behalf of the Respondent Racing Queensland

Decision being appealed: Warned off for life.

Appeal result: Decision varied. The new penalty of ten years warning off.

In this Appeal Mr Kunde appeals the decision of Racing Queensland to warn him off for life and prohibit his greyhounds from racing in any event.

On 28 April 2015 the Board of Racing Queensland considered disciplinary action against Mr Kunde in respect of a charge relating to live baiting and the outcome was that Mr Kunde was warned off for life under Rule 3A of the Local Rules of Racing (Greyhound Racing) (the Local Rules). Further, acting under Greyhound Australasia Rule 14(1)(c), the Board of Racing Queensland have decided that all greyhounds owned by Mr Kunde whether wholly or in part should be prohibited from competing in any event within Queensland subject to protocols or a legitimate sale.

Mr Kunde has appealed both the finding that he breached GAR 86 (Q) and the penalty imposed upon him. He also appeals the penalty imposed on the grounds that it is excessive.

As in many of these cases, the background to the charges was the well-known episode of the ABC Four Corners program on 16 February 2015 concerning live baiting practices and in particular at a property operated by Mr Noble at Churchable.

On 18 March 2015 Mr Kunde was interviewed by Racing Queensland officials when he admitted his presence at the track. On 15 April 2015 he was given a show cause notice as to the allegation. This is reproduced in paragraph 6 of the Board's Statement of Reasons. Essentially, Mr Kunde had engaged in conduct detrimental or prejudicial to the interest,

welfare, image, control or promotion of greyhound racing by his participation in live baiting on 22 August 2014. The Board gave their detailed statement of reasons.

Mr Kunde in this Appeal was represented by Mr A.D. Scott of Counsel and we are in possession of submissions made by Mr Kunde's Counsel to this Board. Similarly Mr D.R. Kent QC Counsel for the Respondent Racing Queensland also gave us submissions as to why the penalties should be maintained. That is a warning off for life.

The thrust of the submissions by Mr Scott was that the conduct that had a detrimental and prejudicial effect was the live baiting itself and not the witnessing of the live baiting. He went on to surmise that no trainer who witnesses live baiting would ever come forward as a witness if by this they were to face charges themselves for witnessing live baiting.

On the other hand Counsel for the Respondent submitted there was sufficient evidence to sustain the convictions. He submitted that the Board had properly considered the matter and had regard to the Briginshaw Standard of Proof. He further submitted that the Appellant had admitted being at the track on the transcript at page 22.

We refer to the Transcript, page 22, as follows:

THE CHAIRMAN:

“Who's the big gentleman in the high-viz? Is that you?”

MR KUNDE:

“Could be”

MR KUNDE:

“Yeah, but it's not a very good picture there. How clear is that picture?”

THE CHAIRMAN:

“For the benefit of this inquiry, Mr Gatti did nominate that as being you”

MR KUNDE:

“Yeah, okay, well, it probably is”

THE CHAIRMAN:

“Do you recall this day at all?”

MR KUNDE:

“Oh, that was a fair – I think it was raining that day, to be honest”

THE CHAIRMAN:

“Yeah, I think you're right. We have seen footage where it does start raining”

MR KUNDE:

“I think it’s raining that day, that’s right”

Mr Kunde is also visible in the video and was involved by his presence at the track.

Further in the Transcript at page 28 and I quote:

VIDEO SHOWN

THE CHAIRMAN:

“What do you see on the arm there? At 11:08”

MR KUNDE:

“11:08 – yeah, well, I don’t know, it looks like it could be a pig.”

THE CHAIRMAN:

“Yep”

MR KUNDE:

“A little piglet. It could be”

Further in the Transcript at page 29 and I quote:

MR KUNDE:

“Oh, it’s looking more like a little pig”

Further in the Transcript at page 32 and I quote:

THE CHAIRMAN:

“What we are witnessing by viewing these films is that there’s a live piglet on the lure arm for the purposes of training or educating dogs – greyhounds. Is that a fair comment to make?”

MR KUNDE:

“That’s a fair comment to make. But I don’t think the dog was killing that – that animal”

THE CHAIRMAN:

“Okay. So in your interpretation of live baiting, the dog would have to be killing that animal for it to be classified as live baiting, is that what I can take from that comment?”

MR KUNDE:

“Well, that’s – probably”

It appears from the Transcript that Mr Kunde was attempting to make some distinction between live baiting and animal cruelty, if it is a live piglet.

Mr Kunde has admitted that there was a live pig on the lure to train greyhounds. The live pig on the arm of the apparatus was clearly visible and the trial was clearly conducted with his concurrence. The use of the piglet was part of Mr Kunde’s dog trial which he paid for and participated in.

The finding of this Board is that Mr Kunde by video evidence and by his own admissions was certainly an active participant by his voluntary and deliberate presence at the Churchable property where live baiting was taking place and in particular in relation to his dog trial. We consider that this conduct is indeed detrimental and prejudicial to the interest, welfare, image and control of Greyhound Racing and we dismiss the Appeal in respect of conviction.

Concerning the question of penalty Mr D.R. Kent QC for Racing Queensland had submitted that given the seriousness of the conduct in which the Appellant was involved, together with the principles and authorities which he referred to at the appeal against penalty that this appeal should be dismissed. On the other hand, Mr A.D. Scott of Counsel submitted that the penalty of a warning off for life was excessive. Mr Kunde’s Counsel also referred to a decision of this Board in the case of Craig Wright on 11 June 2015 whereby this Board found that a warning off for life is not likely to have any more affect by way of a deterrent than would a period of 10 years warning off.

As stated previously, this Board is firmly of the view that a strong message needs to be sent to the industry that conduct of this nature will not be tolerated and that significant penalties will be imposed either by way of deterrent or otherwise to reflect this view.

Although this case precedes this ruling and we are not bound by same, on 20 April 2015 Greyhound Racing Rules (GAR) legislated that a mandatory period of disqualification of not less than 10 years is to be imposed on any person who is involved in the practice of live baiting or is convicted in any Court of an offence in relation to the use of an animal carcass or part of an animal with greyhound training.

We also understand that Mr Kunde through his Solicitors has been heavily involved in the Greyhound industry for over 30 years. He has trained greyhounds and appears to have co-operated with the inquiry. Nevertheless, for the reasons above-mentioned, it is our decision that a period of 10 years warning off should be substituted for the determination of Racing Queensland in respect of the life ban and the penalty in this regard is amended accordingly. This appeal is allowed to the extent to reflect that substitution of penalty only save for the finding in respect of prohibition decision herein.

The prohibition decision

Pursuant to Greyhound Australasia Rule 14(1)(c), the Board decided that all greyhounds owned by Mr Kunde, whether wholly or in part, should be prohibited from competing in any event within Queensland, subject to protocols or a legitimate sale.

Very little argument took place on appeal to this Board concerning the above decision or in submissions to this Board by Counsel for the parties in respect thereof.

We are mindful of the recent decision of Justice J Dalton in *Arnold v Racing Queensland & Another (2015) QSC293* and in particular to points [35] and [36] on page 17 of that transcript as well as point [58] on page 23 of that transcript.

Accordingly we make no decision on that aspect of this appeal but rather in accordance with the reasoning of Justice Dalton in the above case, we remit that matter back to the decision maker Racing Queensland for further determination after necessary submissions from the Appellant and the original decision maker encompassing such further matters that could be relevant to that original decision and as envisaged in *Arnold's* case.