APPEAL NO 384

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R J NASH (MEMBER)

APPELLANT:	LINDSAY BRETT HARPER
APPLICATION NO:	A30/08/384
DATE OF HEARING:	2 OCTOBER 1997
DATE OF DETERMINATION:	23 OCTOBER 1997

IN THE MATTER OF an appeal by Mr L.B. Harper against the determination made by the Western Australian Trotting Association Stewards on 9 September 1997 imposing a 2 year disqualification under Rule 55A for a breach of Rule 501A(1)(b) of the Rules of Trotting.

Mr M McCusker QC assisted by Ms S Herman, instructed by Hammond Worthington Prevost, represented the Appellant.

Mr R J Davies QC, instructed by Minter Ellison, represented the Western Australian Trotting Association Stewards.

The Appellant was convicted by the Western Australian Trotting Association Stewards on 14 April 1997 of an offence against Rule 501A(1)(b) of the Western Australian Trotting Association Rules of Trotting ("the Rules"). Pursuant to Rule 55A of the Rules the Stewards disqualified the Appellant for life on the understanding that the Appellant had committed a fourth offence of the kind to which Rule 55A was applicable. Rule 55A required the Stewards to impose as a minimum a life disqualification on the Appellant unless, having regard to any extenuating circumstances under which the offence was committed, the Stewards decided otherwise.

The Appellant appealed against the decision of the Stewards to this Tribunal both in relation to conviction and penalty. That appeal was heard on 19 May 1997 and this Tribunal delivered a reserved decision in that matter on 22 August 1997.

The Tribunal dismissed the appeal against conviction but upheld the appeal against penalty and referred the matter of penalty back to the Stewards. The reasons for that determination were published on 22 August 1997 and I do not propose to repeat them here. In essence, however, the Tribunal upheld the appeal against penalty on the following grounds:-

(a) The Stewards erred at law in that the offence should have been treated by the Stewards as the Appellant's third offence instead of fourth offence when determining what the minimum penalty was under Rule 55A; and

(b) The Stewards failed to take into account that there were extenuating circumstances in the Appellant's case and accordingly were not required to impose the minimum penalty as provided for in Rule 55A. The Tribunal considered that although the Appellant had possession of the drugs as a matter of law there were extenuating circumstances in that he had been mistaken as to his legal and factual position under the Rules in that he believed and understood that Mr Rose owned the drugs (which understanding was corroborated by Mr Rose) and did not consider that he was doing anything wrong.

The Tribunal referred the matter back to the Stewards to reconsider the question of penalty. The Stewards considered the question of penalty afresh on 9 September 1997. After taking into account this Tribunal's reasons in respect of the question of penalty, the Stewards imposed a 2 year disqualification less the 7 weeks and 2 days of disqualification the Appellant had already served.

The penalty imposed by the Stewards at the rehearing was less than half the minimum penalty provided for by Rule 55A(c), being 5 years.

The Appellant now further appeals against the revised penalty imposed by the Stewards disqualifying him for 2 years on the basis that the penalty is manifestly excessive. Annexed to this determination is a copy of the Appellant's Notice of Appeal.

It was argued by the Appellant's Counsel, Mr McCusker QC, that apart from the extenuating circumstances identified by the Tribunal in its decision of 22 August 1997 the following facts were also extenuating:-

1. The drugs were owned by Dr Rose, the Veterinary Surgeon who was involved in treating horses at the Palm Lodge Pacing Stables.

2. Mr Currie, who was the registered trainer for the Palm Lodge Pacing Stables, had directed the Appellant to remove the drugs from the fridge and put them in the safe and there was no evidence that the Appellant had put the drugs in the fridge in the first place.

3. The Appellant locked the safe and put the key on the top shelf of the nearby whiteboard and when the Stewards came to inspect the stables, Mr Currie did not know where the key was and as a result when the Appellant came along he got the key and opened the safe.

Mr McCusker argued that these facts put the Appellant's action at the very lowest end of the scale. He described it as unfortunate for the Appellant that he knew where the key was.

Mr McCusker also submitted that the Appellant was not a Trainer, within the meaning of the Rules of Trotting in that he did not have direction or control of the training of the horses at the Palm Lodge Pacing Stables. Mr McCusker submitted the lack of direction or control in the training of the horses at the stables was a very significant extenuating circumstance. He conceded that the submission that the Appellant was not a Trainer to whom Section 501A applied would be inconsistent with the Tribunal's earlier decision of 22 August 1997 refusing the Appellant's appeal against conviction since it was implicit in the Tribunal's earlier decision that the Appellant was a Trainer. However, I understand Mr McCusker's submission to be that

despite that inconsistency, the Tribunal could still find the Appellant did not have direction or control of the horses at the Palm Lodge Pacing Stables as an extenuating circumstance when considering the question of penalty albeit it clearly cannot reconsider its decision in respect of the conviction.

Although I appreciate there is some force to the argument, I am not convinced the Tribunal was wrong in finding that the Appellant was a Trainer to whom Rule 501A applied even if he did not have direction or control of the horses at the Palm Lodge Pacing Stables. However, it is my understanding that the issue is whether or not the Appellant had direction or control of training the horses at the Palm Lodge Pacing Stables that is the essence of the extenuating circumstance, not whether as a matter of interpretation the Appellant was a Trainer to whom Rule 501A applies. To find the latter an extenuating circumstance would be directly contradictory and repugnant to the Tribunal's previous decision in dismissing the Appellant's appeal against conviction.

In my view it is artificial to strictly analyse the evidence of the Appellant's direction or control in the training of horses at the stables at 428 Reservoir Road, Orange Grove, in isolation. It is relevant to consider in the broader sense what the Appellant's involvement and level of input in the training and maintenance of horses at the stables was.

There was evidence before the Stewards to the following effect:-

(i) The Appellant was a registered trainer and licensed driver with the Western Australian Trotting Association.

(ii) The Appellant was at the material time a joint registered proprietor of the Palm Lodge Pacing Stables with Mr Currie which business was carried on at the premises at 428 Reservoir Road Orange Grove.

(iii) The Appellant had submitted in his 1996/1997 licence application that his registered stable was at 428 Reservoir Road Orange Grove prior to the season beginning but later

stood himself down from training and travelled to America. The Appellant said when he returned from America he worked for Mr Currie at the stables at 428 Reservoir Road.

(iv) The Appellant had cheque signing authority for the Palm Lodge Pacing Stables cheque accounts.

(v) The Appellant said he worked at the Palm Lodge Pacing Stables approximately 4 hours a day.

(vi) Mr Currie said he took advice from the Appellant in training horses at the stables both because of the Appellant's greater experience and the fact that the Appellant was the reinsperson for the stables.

(vii) The Appellant said he was not paid a wage but Mr Currie paid his phone bill, fuel and anything that he did towards the horses.

(viii) Mr Currie said at page 45 of the transcript of the inquiry on 1 April 1997:-

> "Chairman: Why is Mr Harper's name involved in the business name?
>
> Currie: Well I always thought that it would be a good idea for both, both our names to be on it. I mean, he's the person with the reputation.
>
> I mean when he came back from America, you know, that's what I'd asked him to do. And we decided that if it ever made any money one day we'll. He doesn't drag any money out of the place, nor do I. I mean, it takes, it takes a while for an establishment to get going."

(ix) The Appellant described the relationship with Mr Currie at the Palm Lodge Pacing Stable at page 51 of the transcript of the inquiry hearing on 1 April 1997, as follows:-

"Chairman: Thanks, take a seat Mr Harper. Mr Harper could you just describe to the Stewards what your business relationship is with Mr Currie.

Harper: Well we have a partnership on paper Mr Skipper, but basically it's, I drive for the stable. Number one driver for the stable. And I help out, well trackwork mornings and I do most of the fastwork and all that sort of thing. I probably put in a few hours a day at the stables, each day.

Chairman: What and its a business partnership you have?

Harper: Well to, to some extent, yes.

Chairman: To what extent? What powers do you have in being a partner in the business?

Harper: Well basically I am the stable driver, thats, thats my side of the business partnership. It's my expertise that I bring to the partnership.

Chairman: And you have the authority to sign cheques on behalf of the partnership?

Harper: Yes

Chairman: Do you do that?

Harper: Yes, on occasions."

(x) The Appellant maintained that he did not train the horses at the establishment.

(xi) Mr Rose at page 17 of the transcript of 1 April 1997 said he would normally instruct Mr Currie in respect of drug administrations but would also occasional speak to the Appellant about drug administrations for the horses. He said the Appellant would know what drugs they had at the stables because "he's always out there". Mr Rose also said he supposed the Appellant would do some of the administrations although the Appellant, in his evidence to the Stewards, refuted that he did any.

(xii) The Appellant said none of the drugs belonged to him albeit he could not explain why 10ml bottle of valium found in the safe had been labelled by the Manning Veterinary Clinic:-

> "L Harper The 15/10/96. Valium 10ml.
> Horse: NO HOLDS BARRED"

When asked if he was training NO HOLDS BARRED at page 64 of the transcript of the hearing on 1 April 1997, the Appellant responded in the following manner:-

"Chairman:	Were you training NO HOLDS BARRED in October 96?
Harper:	No.
Chairman:	You weren't?
Harper:	I'm just trying to think. (inaudible)
Chairman:	It would be the second month of the new season, would it not? The current season.
Harper:	The current season, no, I was not training him."

The evidence from the Stewards' hearings strongly suggests that the Appellant's level of involvement in training at the Palm Lodge Pacing Stables was somewhat more than a mere employee taking instructions from the proprietor. The Appellant was a partner in the business. He and Mr Currie jointly marketed themselves to clientele of the stables. (See page 42 of the transcript of the inquiry on 1 April 1997) The Appellant was advising Mr Currie in training matters. He was also understood by Mr Rose as a person Mr Rose could discuss treatment of horses at the stables with.

The Stewards found the Appellant to be an active participant in the business of the stables, actively involved in the training and actively involved in aspects of the maintenance of the fitness of the horses at the stables. On reviewing all of the transcripts of evidence I agree with these findings of fact.

I do not agree that the extenuating factors put the Appellant's conduct at the very lowest end of the scale as submitted by Mr McCusker.

It is clear that Rule 501A is a very stringent rule. That rule makes it clear to all owners and trainers of horses to keep drugs away from horses save in exceptional circumstances. The rule is strict because of the considerable difficulties Stewards have in policing their policy of drug free racing which is designed to maintain public confidence in an industry prone to cheating.

In *Harper v Racing Penalties Appeal Tribunal of Western Australia & Anor* (1995) 12 WAR 337, Anderson and Owen JJ at 349 said:-

> "Counsel for the Applicant made much of the fact that a literal construction of the Rules could conceivably result in a trainer guilty of no wrong conduct being disqualified. He tried to persuade the court that no such intention should be attributed to the Committee of the Trotting Association which drew up the Rules. We do not see why. It may well be the case that those familiar with every aspect of the industry and with long experience in it have come to the conclusion that to ensure the integrity of racing and to maintain public confidence in its integrity, there is a need to impose very stringent controls ...."

Although the Appellant was mistaken as to his legal and factual position under the Rules and did not consider he was doing anything wrong, which extenuating circumstances the Stewards have taken into account in imposing their penalty, he demonstrated extraordinary naivety for a trainer and reinsman of such considerable experience who has previously fallen foul of the Rules aimed at keeping the industry drug free. One would expect somebody in the Appellant's position to have been scrupulously careful in ensuring he fully understood the relevant drug provisions of the Rules and ensuring he did not risk contravention of them.

The Appellant also argues that other penalties imposed by the Stewards where extenuating circumstances were shown and which, the Appellant submits, are cases not dissimilar to the

Appellant's case, were substantially less severe than the penalty imposed by the Stewards on the Appellant.

The Appellant compared the conviction of Mr TB Warwick on each of two offences for breaches of Rules 501 and 501A in which case the Stewards accepted that there were extenuating circumstances in that Mr Warwick did not know he was in possession of drugs and fined Mr Warwick $2,500.00 in respect of each of the two offences. Had the Stewards not found there were extenuating circumstances in Mr Warwick's case, he would have been disqualified for life under Rule 55A of the Rules of Trotting because it was his fourth conviction to which Rule 55A was applicable.

The Appellant also referred to the convictions of AL De Campo, R De Campo and P Daqui for presentation offences under Rule 497 of the Rules. Under Rule 55A each of those persons was liable to disqualification for a term of one year but the Stewards ruled that they were satisfied that there were extenuating circumstances in that case and imposed fines ranging between $1,000.00 and $2,000.00 on each of those individuals.

I have great difficulty in drawing any meaningful comparison between the cases referred to by the Appellant and this case. The facts in each of those cases were very different to the facts in this case.

It is not appropriate, in my opinion, to treat this case as one which was at the lowest end of the scale. Rule 55A provides for a minimum penalty of 5 years disqualification for a third offence against Part 42 of the Rules or Part XXXII of the Rules of Trotting that were repealed by the current Rules, unless there are extenuating circumstances. In this instance, this Tribunal has already found that there were extenuating circumstances in this case and that finding has been adopted by the Stewards in their rehearing of the matter on 9 September 1997.

In my view it was appropriate in the circumstances to reduce the penalty to 2 years, being less than half the minimum penalty that would otherwise apply. I do not, therefore, consider that 2 years was excessive in all the circumstances of this case. I should add that I have had regard to all the grounds referred to in the Notice of Appeal in support of the Appellant's contention that

the penalty was manifestly excessive, in reaching my view that the penalty was appropriate in all the circumstances of this case.

I would, accordingly, dismiss the appeal.

ROBERT NASH, MEMBER

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THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:	**LINDSAY BRETT HARPER**
APPLICATION NO:	**A30/08/384**
DATE OF HEARING:	**2 OCTOBER 1997**
DATE OF DETERMINATION:	**23 OCTOBER 1997**

IN THE MATTER OF an appeal by Mr L B Harper against the determination made by the Western Australian Trotting Association Stewards on 9 September 1997 imposing a 2 year disqualification under Rule 55A for a breach of Rule 501A(1)(b).

Mr M McCusker QC assisted by Ms S Herman, instructed by Hammond Worthington Prevost, represented the appellant.

Mr R J Davies QC represented the Western Australian Trotting Association Stewards.

I have read the draft reasons of Mr R Nash, Member. I agree with the reasons and the conclusion and I have nothing to add.

John Prior

Seal of the Racing Penalties Appeal Tribunal of WA

JOHN PRIOR, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (PRESIDING MEMBER)

APPELLANT:	**LINDSAY BRETT HARPER**
APPLICATION NO:	**A30/08/384**
DATE OF HEARING:	**2 OCTOBER 1997**
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IN THE MATTER OF an appeal by Mr L B Harper against the determination made by the Western Australian Trotting Association Stewards on 9 September 1997 imposing a 2 year disqualification under Rule 55A for a breach of Rule 501A(1)(b).

Mr M McCusker QC assisted by Ms S Herman, instructed by Hammond Worthington Prevost, represented the appellant.

Mr R J Davies QC represented the Western Australian Trotting Association Stewards.

I have read the draft reasons of Mr R Nash, Member. I agree with the reasons and the conclusion and I have nothing to add.

PATRICK HOGAN, PRESIDING MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA

APPEAL 384

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**LINDSAY BRETT HARPER**
APPLICATION NO:	**A30/08/384**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR R NASH (MEMBER)** **MR J PRIOR (MEMBER)**
DATE OF HEARING:	**2 OCTOBER 1997**
DATE OF DETERMINATION:	**23 OCTOBER 1997**

IN THE MATTER OF an appeal by Mr L B Harper against the determination made by the Western Australian Trotting Association Stewards on 9 September 1997 imposing a 2 year disqualification under Rule 55A for a breach of Rule 501A(1)(b).

Mr M McCusker QC assisted by Ms S Herman, instructed by Hammond Worthington Prevost, represented the appellant.

Mr R J Davies QC represented the Western Australian Trotting Association Stewards.

By a unanimous decision the appeal against penalty is dismissed.

The fee paid on lodgement of the appeal is forfeited.

PATRICK HOGAN, PRESIDING MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA