

- (b) *in the case of a second such offence, a period of 2 years disqualification;*
- (c) *in the case of a third such offence, a period of 5 years disqualification; and*
- (d) *in the case of a fourth or subsequent such offence, disqualification for life;*

unless, having regard to the extenuating circumstances under which the offence was committed the Controlling Body or the Stewards decide otherwise."

The Stewards inquired of the appellant whether he wished to put to them any extenuating circumstances. In doing that, the Stewards said, at page 41 of the transcript:

"... And an extenuating circumstance has been defined by the Racing Penalties Appeals Tribunal in Appeal Number 257, that of R.A.C. Barber.

"To be something in the nature of an exceptional or unusual occurrence, event or circumstance."

..."

In response to that, the appellant said at page 41:

"I didn't know he had any drugs in him to race. I can. As I said I've got a very sick wife at home. I'm getting a bit old meself as you all know. And I've been in Trotting a long time."

In response to that, the Stewards said at page 44:

"... Things like your, age, your health, your wife's health and her age aren't matters that we can consider when deciding on penalty."

In response to all that, the appellant's grounds of appeal are as follows:

"(1) The Stewards erred in their interpretation of the words "extenuating circumstances under which the offence was committed", as stated in Rule 55A in the Rules of Trotting.

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- (i) *The Stewards erred in finding that there were not extenuating circumstances such to operate in mitigation of the offence.*
 - (ii) *The Stewards erred in finding that factors such as the Appellant's age, his health, his wife's health and her age were not matters to which they should have regard when deciding on penalty.*
- (2) *The Stewards erred in finding that they could not deal with the Appellant by way of a fine having regard to the above factors.*
 - (3) *The Stewards erred in finding in that Rule 55A limits "extenuating circumstances" to the circumstances surrounding the presentation of the horse to race.*

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- (i) *The Stewards erred in not having regard to the circumstances relating to the offence including the stabling arrangements and security measures taken by the Appellant and the fact that those arrangements and measures were sanctioned by the Western Australian Trotting Association and that no complaint had ever been made in relation to them.*
- (ii) *The Stewards erred in not having regard to the fact that there was no significant betting support for the horse to win the race.*
- (iii) *The Stewards erred in not having regard to the fact that the only previous offence committed by the Appellant occurred nearly 20 years ago, relating to a different drug and which offence was in the period before mandatory penalties were envisaged."*

The meaning to the phrase "extenuating circumstance" has been considered in the case of ANDERSON v THE RACING PENALTIES APPEAL TRIBUNAL (UNREPORTED SUPREME COURT OF WA APPEAL NO 1518 OF 1996 DELIVERED 3 OCTOBER 1997, LIBRARY NO 970504). In that case, Steytler J (with whom Kennedy J and Wallwork J agreed) said at page 11:

"... the circumstances referred to must be circumstances under which the offence was committed other than those which are ordinarily present in the case of offences of the kind under consideration and which are unusual or exceptional in that sense."

It is apparent, then, that the Supreme Court has held (in accordance with BARBER'S case) that extenuating circumstances must have the quality of being unusual or exceptional. Accordingly, the definition of extenuating circumstances which the stewards applied was correct.

The Rule itself provides that the extenuating circumstances must relate to the commission of the offence. These circumstances are to be distinguished from circumstances which might only mitigate or lessen penalty, such as a person's personal circumstances in a criminal matter. Accordingly, ground 1(ii) must fail.

As to ground 3(i), stabling arrangements and security measures, if they amount to reasonable and proper precautions to prevent drug administration can provide a defence to the charge. They were not in fact sufficient in this case, because the Stewards convicted the appellant after considering evidence on that very subject. That was the approach which the Supreme Court took in ANDERSON's case (at page 13) in dismissing a similar ground of appeal.

The subject matter of ground 3(ii) does not, in our view, constitute an extenuating circumstance. Ground 3(iii) amounts only to mitigation and not the commission of the offence. Further it ignores the fact that the minimum penalty of a second offence is fixed regardless of the passage of time.

Dealing now with ground 1(i), it was put to us by counsel for the appellant that the appellant's age (72) may have led to a type of loss of faculties (eg. memory) which may have led to him being mistaken in his feeding regime in relation to the horses which may have led to an increase in the TCO₂ level.

The appellant's age, being a personal circumstance, may well constitute an extenuating circumstance or part of an extenuating circumstance leading to a reduction in penalty. However, in this case there is no evidence to support any of the propositions advanced and the argument is merely speculative. For these reasons, ground 1(i) fails, and so too must ground 2.

The appeal is dismissed and the fee paid on lodgement of the appeal is forfeited.

P. J. Hogan

PATRICK HOGAN, PRESIDING MEMBER

John Healy

JOHN HEALY, MEMBER

A. E. Monisse

ANDREW MONISSE, MEMBER

