DETERMINATION AND REASONS FOR DETERMINATIONS OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANTS:	**LINDSAY BRETT HARPER** **JAMES CURRIE**
APPLICATION NOS:	**A30/08/357** **A30/08/358**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR J PRIOR (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**19 MAY 1997**
DATE OF DETERMINATION:	**22 AUGUST 1997**

IN THE MATTER OF an appeal by Mr L B Harper against the determination made by Western Australian Trotting Association Stewards on 14 April 1997 imposing a life disqualification under Rule 55A for a breach of Rule 501A(1)(b) of the Rules of Trotting;

and

IN THE MATTER OF an appeal by Mr J Currie against the determination made by Western Australian Trotting Association Stewards on 14 April 1997 imposing a one year disqualification under Rule 55A for a breach of Rule 501A(1)(a) of the Rules of Trotting.

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

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

APPEAL 357 - LINDSAY BRETT HARPER

This is a unanimous decision of the Tribunal. The appeal as to conviction is dismissed. The appeal as to penalty is upheld. The penalty is set aside. The matter of penalty is referred back to the Stewards to reconsider in accordance with the reasons now published.

The fee paid on lodgement of the appeal is forfeited.

APPEAL 358 - JAMES CURRIE

The unanimous decision of the Tribunal is that the appeal is allowed and the conviction quashed.

The fee paid on lodgement of the appeal will be refunded.

PATRICK HOGAN, PRESIDING MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA

APPEALS 357 & 358

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**LINDSAY BRETT HARPER** **JAMES CURRIE**
APPLICATION NO:	**A30/08/357** **A30/08/358**
PANEL:	**MR P HOGAN (A/CHAIRPERSON)**
DATE OF HEARING:	**23 APRIL 1997**
DATE OF DETERMINATION:	**23 APRIL 1997**

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

-and-

IN THE MATTER OF an appeal by Mr J Currie against the determination made by Western Australian Trotting Association Stewards on imposing a one year disqualification under Rule 55A for breach of Rule 501A(1)(a).

Mr T F Percy assisted by Ms Herman, instructed by Hammond Worthington Prevost, represented both appellants.

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

This is a hearing of applications for a stay of proceedings. The applications are brought by the appellants Mr Harper and Mr Currie. The applications have been heard together and these reasons apply to both appellants.

Jurisdiction to grant a stay is given by section 17(7) of the Racing Penalties (Appeals) Act. I am being asked to suspend the operation of the penalty, of a disqualification for life in relation to Mr Harper, and the penalty of one year disqualification in relation to Mr Currie. Both persons have lodged appeals against conviction and penalty.

In support of the applications for a stay, it is submitted that each applicant has very strong grounds to succeed in his appeal against conviction. I have read the transcript of the Stewards inquiry, I am satisfied that each appellant has an arguable case in respect of the appeals against conviction.

In relation to Mr Harper he was convicted of the offence of being found in a place with schedule 4 drugs mentioned. It is not apparent that the Stewards gave consideration to the meaning of the word "with" as contained in Rule 501A(1)(b). The Stewards did not express any reasons for discounting the evidence of Dr Rose, who apparently claimed exclusive ownership of the drugs.

In relation to Mr Currie, he was convicted of the offence of being found in possession of the drugs mentioned. Again it is not apparent that the Stewards gave any consideration to the legal meaning to the word "possession" as contained in Rule 501A(1)(a). And again the evidence of Dr Rose is relevant to the determination of whether Mr Currie was in fact, in possession.

For these reasons there appears to be an arguable case for Mr Harper and Mr Currie in relation to each persons appeal against conviction. A stay could be granted. However, there would be no need to have a stay if the appeals could be determined expeditiously in the context of times relevant to the Trotting industry generally and this Tribunal. The respondent is ready to argue the appeals against both conviction and penalty. The appellants should be ready, in respect of the appeal against conviction, in the sense that the issues on appeal against conviction should be legal issues. Each party is legally represented and this Tribunal itself is comprised of legal practitioners. I would have thought that five lawyers between them ought to be able to determine the legal meaning of the word possession and the other matters regarding interpretation of the rules which may be argued on appeal.

The appellants raised the possibility that their counsel of choice may not be available at short notice. The respondents point to the undesirability of disqualified persons operating under a stay of proceedings, thus rendering decisions of the Stewards nugatory for an uncertain period of time. It may be the question of counsel of choice should take second place to the interest of the industry as a whole.

The appeals against conviction should proceed at the first available date. If an early date is set there would be little prejudice to each of the applicants. The balance of convenience is with an early listing and therefore no necessity for a stay.

There remains, however, the question of the appeal against penalty. Each appellant has appealed on a ground that the Stewards generally failed to take into account the extenuating circumstances of the case pursuant to Rule 55A of the Rules of Trotting.

In the previous case of Barber, the Tribunal has said that "extenuating circumstances" contemplates something of the nature of an exceptional or unusual occurrence, event or circumstance. In the case of Charles, the Tribunal stayed the operation of a penalty on disqualification pending the outcome of proceedings in the Supreme Court in the matter of Anderson.

In Anderson, the Supreme Court will be asked apparently to decide on the meaning of the phrase "extenuating circumstances". The appellants in this case submit that as in the Charles case, a stay should be granted pending the decision of the Supreme Court in Anderson. In my view, this case is different from Charles case, in particular the appellant Charles did not appeal against his conviction. It may be that the appellants here will succeed in their appeals against conviction. If they do, there will be no need to go on to consider the question of penalty. If they do not, they may take their remedy in the Supreme Court. The respondents may concede or agree the interpretation of the phrase "extenuating circumstances" which is acceptable to the appellants. The point is that there are too many imponderables to justify, in my view, anything other than an expeditious hearing on both appeals against conviction and penalty.

There will be an expeditious hearing and for that reason the balance of convenience is against a stay, and I therefore refuse the applications for a stay.

PATRICK HOGAN, A/CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.

DETERMINATION AND REASONS FOR DETERMINATIONS OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANTS:	**LINDSAY BRETT HARPER** **JAMES CURRIE**
APPLICATION NOS:	**A30/08/357** **A30/08/358**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR R NASH (MEMBER)** **MR J PRIOR (MEMBER)**
DATE OF HEARING:	**19 MAY 1997**
DATE OF DETERMINATION:	**22 AUGUST 1997**

IN THE MATTER OF an appeal by Mr L B Harper against the determination made by Western Australian Trotting Association Stewards on 14 April 1997 imposing a life disqualification under Rule 55A for a breach of Rule 501A(1)(b) of the Rules of Trotting;

and

IN THE MATTER OF an appeal by Mr J Currie against the determination made by Western Australian Trotting Association Stewards on 14 April 1997 imposing a one year disqualification under Rule 55A for a breach of Rule 501A(1)(a) of the Rules of Trotting.

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

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

This is a unanimous decision of the Tribunal.

These are appeals against conviction and penalty. The appellant, HARPER, is a registered trainer and reinsperson. The appellant, CURRIE, is a registered trainer. The appellants are in partnership in a business known as PALM LODGE PACING STABLE. The business operates a pacing stable situated at 428 Reservoir Road, Orange Grove.

On 5 February 1997, the Stewards attended at the stable with the permission of Mr Currie. In his presence, the Stewards searched the stable part of the property. Stewards also searched Mr Currie's house, which is situated on the same property.

In the storeroom of the stable, in a refrigerator, the Stewards found quantities of two drugs. On later analysis, those proved to be drugs specified in Schedule 4 of the *Poisons Act 1964* (as amended). Those drugs were AMPHOPRIM and BUTASYL. (transcript 1 April 1997 page 37 {$T^2$37})

In a locked safe in the same storeroom, the Stewards found quantities of 13 other drugs, which as well proved to be Schedule 4 drugs. Those drugs were ACTH, ADEQUAN, ATROVENT, DADA 15, DEXAPENT, FERRUM H, HEPTENAL, LASIX, SA INJECTION, SPUTOLYSON, TRIDENOSEN, VALIUM AND VENTIPULMIN (transcript 14 April 1997 {$T^3$55})

The stables in question were the registered stables of both Mr Harper and Mr Currie, and both were registered trainers. Those facts, together with the finding of the drugs, led the Stewards to begin an inquiry into whether or not there had been a breach of Rule 501A.

The initial inquiry into this matter was held on 11 March 1997. The inquiry proper was commenced on 1 April 1997 and concluded on 14 April 1997.

Rule 501A is in the following terms:-

"Possession of Specified Drugs

501A (1) Except as provided by Part (2) of this Rule, an Owner or Trainer who -

(a) has in his or her possession; or

(b) is found in any place with, any quantity of drug specified in Schedules Four (4) or Eight (8) of the Poisons Act 1964.

commits an offence unless, upon the demand of an authorised officer, the person presents to the authorised officer a prescription for the drug that was issued -

(i) within 12 months prior to the authorised officer's demand, and

(ii) by a qualified veterinarian who prescribed the drug for a particular horse after personally examining that horse.

(2) An Owner or Trainer may have possession of a Schedule Four (4) drug for the specific purpose of emergency treatment to a horse owned or trained by the Owner or Trainer, providing that -

(a) a qualified veterinarian prescribed and dispensed the drug after consultation with the Owner or Trainer regarding its use; and

(b) the name of the drug appears in the list of permitted Schedule Four (4) drugs published from time to time by the Controlling Body, and the quantity of the drug in the possession of the Owner or Trainer shall not exceed the quantity allowed in the list; and

(c) the Owner or Trainer shall maintain a detailed written record of each administration of the drug, including the date, time, amount and purpose of

the administration and the name of the person making the administration, and

(d) upon the demand of an authorised officer the Owner or Trainer shall present the written record to the authorised officer.

(3) When a drug is found in the possession of an Owner or Trainer contrary to the provisions of Part (2) of this rule, the Owner or Trainer commits an offence.

(4) Where any drug specified in Schedules Four (4) or Eight (8) of the Poisons Act is found in a training establishment, stable area or racecourse, an Owner or Trainer who keeps horses at that place is deemed to have the drug in their possession for the purpose of Rule 501A (1), (2) and (3)."

At the first sitting of the inquiry on 1 April 1997, the Stewards asked Mr Currie to produce a prescription in relation to ADEQUAN, in terms of Rule 501A ($T^2$12). At the second sitting of the inquiry on 14 April 1997, the Stewards again asked Mr Currie to produce relevant prescriptions, this time in relation to each of the drugs ($T^3$55). No prescription was produced.

At the 14 April 1997 sitting, the Stewards asked Mr Harper to produce a prescription in relation to all the drugs ($T^3$63). No prescription was produced.

Evidence was given by Mr Rose at the inquiry. He was the veterinarian for the stables. His evidence was to the effect that all the drugs were his (except the ADEQUAN). He said that they were owned by him ($T^2$15-25, $T^2$31, $T^3$74).

Each of the appellants gave evidence to the effect that he knew the drugs were there, but that they belonged to Dr Rose.

Following on from the investigative part of the inquiry, the second appellant, Mr Currie, was charged with failing to produce a prescription for drugs found in his possession ($T^3$94). The first appellant, Mr Harper, was charged with failing to produce a prescription for drugs which he was "found with" ($T^3$96).

Each appellant was convicted, and now appeals against his conviction.

APPEALS AGAINST CONVICTION

The grounds of appeal against conviction in respect of the second appellant Currie were originally as follows:-

"1.1 The Stewards failed to:

(1) advise the Appellant of the nature of the charges being laid against him;

(2) advise the Appellant in writing of the nature of the charges being laid against him;

(3) allow the Appellant to hear all the evidence being put against him;

(4) allow the Appellant a reasonable opportunity to respond to the charges upon informing the Appellant he had been charged;

(5) allow the Appellant the opportunity to obtain legal advice in relation to the charges;

(6) consider that the Appellant was not in possession of the drugs within the meaning of the Rules of Trotting;

(7) consider that the Appellant, if he was in possession of drugs within the meaning of the Rules of Trotting, had a lawful excuse for so being in possession;

(8) consider that the Appellant, or the Appellant's vet Mr Kim Rose, maintained a detailed written record of each administration of the drug, including the date, time, amount and purpose of the administration, the name of the horse receiving the administration and the name of the person making the administration;

(9) consider that upon demand the Appellant, and or his vet Mr Kim Rose, presented the written record to an authorised officer within the meaning of the Rules of Trotting."

These grounds were added to by leave, and the further grounds are as follows:-

"1. Rule 501A is ultra vires of the powers of the Association and is invalid. Alternatively Rule 501A is void for uncertainty;

2. The WATA Stewards failed to show any proper understanding of the nature of the offence in Rule 501A of the Rules of Trotting;

3. The Stewards failed to consider, or to give proper consideration to, the fact that the First Appellant was not found in any place with any Schedule 4 or Schedule 8 drugs as a matter of law; and

4. The Stewards failed to consider, or to give proper consideration to, the fact that the Second Appellant was not in possession of any Schedule 4 or Schedule 8 drugs as a matter of law."

Ground 1.1(6) is duplicated by Ground 4 (additional).

The grounds of appeal against conviction in respect of the first appellant HARPER were originally as follows:-

"1.1 The Stewards failed to:

(1) advise the Appellant of the nature of the charges being laid against him;

(2) advise the Appellant in writing of the nature of the charges being laid against him;

(3) allow the Appellant to hear all the evidence being put against him;

(4) allow the Appellant a reasonable opportunity to respond to the charges upon informing the Appellant he had been charged;

(5) allow the Appellant the opportunity to obtain legal advice in relation to the charges;

(6) consider that the Appellant is not a trainer within the meaning of the Western Australian Trotting Association Rules of Trotting, not being engaged in the training of any horse;

(7) consider that the Appellant is not an owner within the Western Australian Trotting Association Rules of Trotting;

(8) consider that the Appellant was not in possession of the drugs within the meaning of the Rules of Trotting;

(9) consider that the Appellant, if he was in possession of drugs within the meaning of the Rules of Trotting, had a lawful excuse for so being in possession;

(10) consider that the Appellant, through either Mr James Currie or Mr Kim Rose, maintained a detailed written record of each administration of the drug, including the date, time, amount and purpose of the administration, the name of the horse receiving the administration and the name of the person making the administration;

(11) consider that upon demand the Appellant, and or Mr James Currie and or Mr Kim Rose, presented the written record to an authorised officer within the meaning of the Rules of Trotting."

Again, these grounds were added to by leave in the terms previously mentioned in relation to Mr Currie. The additional grounds joined both appellants together on the same notice.

Grounds 1.1(8) and 1.1(9) are incorrectly drafted, in that the first appellant, Harper, was not convicted of being in possession, but rather being "found with". We will treat the grounds as if they were correctly drafted. Ground 1.1(8) is duplicated by Ground 3 (additional).

At the hearing of the appeals before us, most reliance was placed on the additional grounds of appeal. It is convenient to deal with these grounds first, they relate to both appellants.

1. RULE 501A IS ULTRA VIRES THE POWERS OF THE ASSOCIATION AND IS INVALID. ALTERNATIVELY RULE 501A IS VOID FOR UNCERTAINTY.

a) JURISDICTION

The Tribunal does not have specific power to declare rules invalid or void. The Tribunal was established as a tribunal of limited jurisdiction to decide appeals

against penalties imposed in disciplinary proceedings arising from or in relation to, the conduct of greyhound racing, horse racing and harness racing.

Section 14(1)(b) provides that a determination of the Tribunal in relation to an appeal is final and binding on the parties to that appeal, and not subject to further appeal or review. This of course does not prevent a party from seeking judicial review by way of prerogative writ in respect of any proceedings of the Tribunal. The Tribunal is also required to act according to equity, good conscience and the substantial merits of the case; Section 11(1)(b).

In our view, the requirement to act according to the substantial merits of the case requires the Tribunal when exercising its jurisdiction to act in accordance with law. In order to do so, the Tribunal needs to identify and decide any question of law that is necessary for the determination of an appeal. However, the Tribunal being limited to hearing and determining appeals does not have jurisdiction to make binding declarations of law.

In *Bonton Pty Ltd -v- The City of South Perth*, 4 APAD 78 at 11, the Chairman of the Town Planning Appeal Tribunal of Western Australia, D K Malcolm QC, as he then was, stated in respect of the jurisdiction of the Town Planning Appeal Tribunal of Western Australia:

> *"While the Tribunal cannot make binding declarations of law, that does not necessarily mean that it has no jurisdiction to "decide", for the purposes of the instant appeal, whatever questions of law arise for decision on that appeal. The Tribunal's decision may have no more effect than a mere opinion expressed along the road towards a determination of the appeal, but it may be prevented from coming to a conclusion on the point. In R -v- Hickman; ex parte Fox (1945) 70 CLR 598 Dixon J, while denying the power of a statutory board to determine judicially the meaning of a statutory phrase upon which its jurisdiction depended, distinguished the Board's power to form an opinion upon the question. As he said at p. 618:*
>
> > *`I do not mean to say that the Board may not, for the purpose of determining its own action "decide" in the sense of forming an opinion upon the meaning and application of the words "coal mining industry". It must make up its mind whether this or that particular function on the borders of the coal mining industry does or does not fall within the conception'.*
>
> *This passage was cited with approval by Brennan J in Re Adams and the Tax Agent's Board (1976) 12 ALR 239, at p. 242. Brennan J said:*
>
> > *`An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty the administrative body will, as part of its function, form an*

opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied merely because the opinion produces no legal effect'."

A page 13 Malcolm QC, as he then was, stated:

"It may not be an over simplification to say that a tribunal which is under a duty to decide the matter before it in accordance with law is likewise under a duty not to decide the matter in accordance with an invalid law. As Latham CJ said in South Australia -v- The Commonwealth, (1942) 65 CLR 373, as p. 408:

`A pretended law in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of the court in his favour - but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it - and thereafter invalid. If it is beyond power it is invalid ab initio."

While this tribunal has no power to make a binding decision on the validity of the rules of trotting, it is obliged to express its opinion on the question of validity which arises in the course of determining an appeal. Accordingly, for the purposes of this appeal and its determination, the Tribunal is entitled to consider and express an opinion upon Rule 501A of the Rules of Trotting.

B. LEGISLATIVE SCHEME

The *Western Australian Trotting Association Act 1964* ("the Act") constitutes a body known as The Western Australian Trotting Association ("the Association"). The Act does not declare the objects, functions and powers of the Association. The first By-Laws, published with the Act, do declare the objects, functions and powers.

Pursuant to By-Law 2, the objects of the Association are as follows:-

"2. *The main object of the Association shall be to foster and extend the sport of trotting through out Western Australia and the importation and breeding of trotting horses, and to keep the sport of trotting clean and free from abuse, and also to regulate and control that sport wherever carried on in the State."*

The rule making power comes from By-Law 59, in particular, for the purposes of this case, By-Laws 59(b) and (c). They are in the following terms:-

"59. *The Committee shall have power from time to time to make, alter and repeal rules for -*

(b) determining the rules and conditions to be observed by owners, nominators, riders, drivers, competitors, trainers, and other assistants before, during or after any race meeting, including nominations;

(c) generally determining such Rules of Racing applicable before, during and/or after the actual racing as the Committee in its absolute and unfettered discretion thinks fit to lay down or prescribe;"

It is clear that Parliament has given unfettered authority to the Committee of the Association to make rules of racing in the sport of trotting. The Committee itself can determine the objects and powers of the Association. The Act does not declare those objects and powers.

Section 7(2) of the Act provides:-

"(2) The Committee by an absolute majority in number of the Committee may from time to time amend or repeal such by-laws and make new by-laws not inconsistent with this Act which are necessary or convenient for carrying out or generally giving effect to the purposes of this Act."

The Committee of the Association is therefore free to make whatever by-laws it chooses in relation to the sport of trotting. It is not directed or constrained by the Act.

In this case, the by-laws can be categorised as the primary legislation, and the rules can be categorised as delegated legislation. This is so even though it is the Committee which makes the by-laws and the Committee which makes the rules. The by-laws declare the objects of the Association, and the rules must not exceed the scope of the by-laws.

C. APPLICABILITY TO THIS CASE

The primary argument of the appellants is that Rule 501A has no sufficient nexus with the objects of the Association, as set out in By-Law 2. The rule is said to be ultra vires for that reason.

Counsel for the appellants gave examples of situations where the rule would operate without any connection to keeping "... *the sport of trotting clean and free from abuse*". A person could visit a training establishment, in possession of his own legitimately issued Schedule 4 or 8 drugs, and an owner or trainer at that place thereby commits an offence. Similarly, a vet visiting stables, in possession of his own drugs, causes an owner or trainer to be guilty of an offence.

The argument and the illustrations given tend to draw together the legal notions of repugnancy and ultra vires. The doctrine of repugnancy is that the delegated legislation must fit within "the general law" if it is to be valid. In *Gentel -v- Rapps(1902)* 1 KB 166, Channel J said :-

"A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful ... Again, a by-law is repugnant if it adds something inconsistent with the provisions of a statute creating the same

offence; but if it adds something not inconsistent, that is not sufficient to make the by-law bad as repugnant."

In *R -v- Minister of State for the Interior (1972)* 20 FLR 458, Fox J suggested that repugnancy is not an independent ground for invalidity, but merely a consideration affecting power.

In considering the question of whether or not Rule 501A is ultra vires, we consider it is necessary to examine what the elements of the offence are. In our view the principal elements are as follows:

a) That an Owner or Trainer (as defined by the Rules) must have in his or her possession or be found in any place with a drug specified in Schedule 4 or 8 of the Poisons Act 1964.

b) A demand must be made of that Owner or Trainer by an authorised officer. For the reasons given below we are of the view that the reference to "authorised officer" in Rule 501A has the same definition as authorised officer is defined to mean by Rule 26 for Part 4 of the Rules.

c) That upon a demand being made by an authorised officer, the Owner or Trainer shall present to the authorised officer a prescription for the drug that complies with the requirements set out in sub-rules 501A (1) (i) and (ii).

Therefore, in our view, no offence is committed unless a demand is made and not complied with.

Further we agree with Mr McCusker's submission that the deeming provision in sub-rule 501A (4) should be interpreted as a rebuttable presumption.

On the basis of the above said interpretation of Rule 501A, we do not see the rule to have, in practical terms, as broad a reach as was suggested by Mr McCusker. The ambit of the rule is tempered by the fact that it prescribes as an element of the offence the need for an authorised officer to made a demand. In our view it is highly unlikely that an authorised officer would make å demand other than in the course of the bona fide exercise of his or her functions, powers and duties under the Rules.

Accordingly, we are of the view that Rule 501A is not ultra vires the Association.
There remains, however, the submission that Rule 501A is void for uncertainty. It was submitted that the Rule is uncertain because there is no definition of an "authorised officer". There is no person who can make the demand mentioned in Rule 501A(1). It is argued that if the second part of 501A(1) is an element of the offence, then the offence could never be committed because there is no authorised officer.

In order to give the Rule meaning, we are prepared to find that the term "authorised officer" has the same meaning as in Part 4 of the Rules. It is only the powers in Part

4 which could reasonably lead to the finding of drugs necessary for Rule 501A to operate. It is clear in our view the term "authorised officer" in Rule 501A bears the meaning given in Rule 26.

2. **THE WATA STEWARDS FAILED TO SHOW ANY PROPER UNDERSTANDING OF THE NATURE OF THE OFFENCE IN RULE 501A OF THE RULES OF TROTTING.**

This is the second of the additional grounds of appeal. It relates to both appellants.

The Chairman of Stewards gave reasons for decision in convicting both appellants ($T^3$99 - $T^3$100). In those reasons, reference was made to the purpose for the Rule and its history. No reference was made to the technical aspects of the Rule. In our opinion, that is not sufficient to ground a successful appeal. The Stewards are not expected to give detailed legal reasons. In any event, it is apparent from a reading of the transcript as a whole that the Stewards were aware of all relevant matters. They were concerned to find out the state of knowledge of each appellant, and the degree of control exercised. The appellant Currie was not proceeded against in respect of the drug ADEQUAN, as he satisfied the Stewards in relation to that drug.

3. **THE STEWARDS FAILED TO CONSIDER, OR GIVE PROPER CONSIDERATION TO, THE FACT THAT THE FIRST APPELLANT WAS NOT FOUND IN ANY PLACE WITH ANY SCHEDULE 4 OR SCHEDULE 8 DRUGS AS A MATTER OF LAW.**

This ground of appeal, relating to Mr Harper, duplicates Ground 1.1(8) of the original grounds.

Mr Harper was not convicted of any offence in relation to Schedule 8 drugs.

As a matter of law, we cannot find any meaning of the phrase "found with". By its inclusion in the Rule in addition to the word "possession", we presume the draftsman intended it to mean something different. We heard no argument or submissions on the point.

We are of the opinion that "found with" has a meaning similar to the phrase "in possession". There must be a mental element, that is a state of knowledge. The person must know that he is "with" the item in question, or that it is "with" him. There must also be an intention to exercise dominion or control over the thing in question.

The relevant evidence on this point, so far as possession or "found with" is concerned, is as follows:-

*reference to the transcript of the inquiry held 11 March 1997 will be prefixed by T^1 followed by the page number (eg page 37 = $T^1$37)

- Mr Harper was registered as a trainer at the premises in question $T^1$63
- Two Schedule 4 drugs were found in the refrigerator in the storeroom $T^1$64
- Mr Currie said the safe in the storeroom belonged to Mr Harper $T^1$64/$T^2$7
- Other Schedule 4 drugs were found in the safe $T^1$65

- Mr Harper said the safe and the drugs in it were Mr Currie's $T^{1}65/T^{2}7$
- Mr Currie said he had no access to the safe and did not know of the contents $T^{1}66/T^{1}76$
- Mr Currie said the drugs in the safe (apart from ADEQUAN) were supplied and owned by Mr Rose $T^{1}66/T^{1}68/T^{1}77$
- The drugs in the safe had previously been in the refrigerator $T^{1}67/T^{1}69/T^{1}76$
- Mr Currie told Mr Harper to move them into the safe $T^{1}77/T^{2}37$
- Mr Currie said that the drugs in the safe were not being hidden $T^{1}70$
- The Stewards believed that Mr Rose owned the drugs in the safe $T^{1}79$
- Mr Rose said he owned the drugs $T^{2}14/T^{2}17/T^{2}18$ $T^{2}19/T^{2}26/T^{2}31$ $T^{3}68\text{-}T^{3}75/T^{3}89$
- Mr Rose said Mr Currie and Mr Harper would be aware that the drugs were there $T^{2}18$
- Mr Rose said he had no access to the safe $T^{2}24$
- Mr Harper said that he had kept drugs at the stables, but not his drugs $T^{2}34$
- Mr Harper said the safe and it's contents belonged to the stable $T^{2}35/T^{2}36$
- Mr Harper said that the drugs belonged to Mr Rose $T^{2}36$
- Mr Harper said that Mr Currie did not know the whereabouts of the key to the safe $T^{2}39/T^{2}40$
- The Stewards were of the opinion that the drugs were accessible only to Mr Harper $T^{3}92$

Based on all of the above (and the failure to produce a prescription), the Stewards convicted Mr Harper. At page 99 (14 April 1997 inquiry), the Stewards said that the circumstances of the keeping of the drugs was unsatisfactory. There was a complete disregard of Rule 501A. The appellants refused to accept responsibility, and there were no records kept. Nowhere did the Stewards mention that Mr Harper was "found with" the drugs. The closest the Stewards came to that was pointing out that Mr Harper was the only person who had access.

The Stewards pointed out that it was their opinion that the claim that Mr Rose owned the drugs was an attempt to circumvent the Rule. They stated there was no evidence presented that supported the contention that Mr Rose owned the drugs ($T^{3}100$).

We are of the opinion that the Stewards were in error in discounting what Mr Rose had said about the drugs. What Mr Rose said at the inquiry was itself evidence. There was no indication through the course of the hearing that the Stewards disbelieved his testimony. Indeed the only indication was to the contrary ($T^{1}79$).

Mr Rose gave evidence on oath at the hearing before us, and claimed ownership of the drugs. He was cross-examined and, in our opinion, did not alter his position on that point. At the hearing before us, Mr Rose produced documentary evidence which indicated that he did own all of the drugs.

In our opinion, the Stewards were in error in giving no weight to the evidence of Mr Rose at the inquiry. A reading of the transcript, together with the oral evidence of Mr Rose before us, at the hearing, leads us to find as a fact that all of the drugs in the safe and in the refrigerator (apart from the ADEQUAN) were owned by Mr Rose.

Two things are necessary to establish possession, or being "found with". First, there must be actual physical custody, or a state of having dominion or control. Secondly, there must be knowledge. A person must know that he possesses the thing in question. *(He Kaw The (1985)* 157 CLR 523).

The concept of possession is not exclusive. Possession can be joint. Possession can co-exist with another person's possession, or even, ownership. In this case, there is no doubt that Mr Rose owned the drugs. But, there is evidence that Mr Harper possessed the drugs. He exercised dominion and control by placing the drugs in the safe. He hid the key. He excluded anyone else from obtaining possession, except by asking him. By his own admission, Mr Harper knew what he put in the safe. It seems to us that Mr Harper satisfied all the legal tests for "possession", and being "found with".

For the above reasons, we find that this ground of appeal must fail.

4. THE STEWARDS FAILED TO CONSIDER, OR GIVE PROPER CONSIDERATION TO, THE FACT THAT THE SECOND APPELLANT WAS NOT IN POSSESSION OF ANY SCHEDULE 4 OR SCHEDULE 8 DRUGS AS A MATTER OF LAW.

This ground of appeal, relating to Mr Currie, duplicates Ground 1.1(6) of the original grounds. Mr Currie was not convicted of any offence in relation to Schedule 8 drugs.

The relevant evidence on the point of possession is as set out above in relation to Mr Harper. In addition, the following evidence is relevant:

- Mr Currie said that Mr Rose owned the drugs in the refrigerator. T[1]60/T[1]61
- Mr Currie said the safe belonged to Mr Harper. T[1]62
- Mr Currie said the drugs in the safe (apart from ADEQUAN) belonged to Mr Rose T[1]63/T[1]66 T[1]68/T[1]78

As stated above, and for the reasons stated above, we find as a fact that all of the relevant drugs were owned by Mr Rose. The question for the Stewards, and for us, is whether the evidence establishes that Mr Currie was relevantly in possession.

In our opinion, the evidence established that Mr Currie was not in possession of the drugs and accordingly the presumption in Rule 501A(4) is rebutted.

Mr Currie did not have a key to the safe. Only Mr Harper could access the drugs in the safe.

In our opinion the facts do not amount to exercising dominion and control over the drugs so as to constitute possession. The most that can be said is that Mr Currie permitted Mr Rose to store his (Mr Rose's) drugs at the stable. Mr Currie, as a matter of practice, must have permitted Mr Rose to have access to the stables. The way in which Mr Rose went about his duties, and his storage of the drugs, included Mr Currie allowing him that access.

Accordingly, we uphold this ground of appeal. The second Appellant's appeal succeeds on this ground.

We turn now to consider the original grounds of appeal against conviction.

ORIGINAL GROUNDS OF APPEALS AGAINST CONVICTION

At the hearing of these matters none of these original grounds of appeal were supported by substantial oral or written submissions by Counsel for the Appellants. Counsel relied primarily on the additional grounds of appeal but nevertheless the original grounds were not abandoned.

Original grounds of appeal 1.1 (1) - (5) are identical with respect to both the first and second Appellants. In essence they suggest that the Stewards in dealing with these matters at the various inquiries failed to follow the normal procedure for such an inquiry as set out by the rules or the way the matters were dealt with effectively gave rise to denial of natural justice for each Appellant. There is nothing in the transcripts of the various inquiries which suggest that the procedure followed by the Stewards in these matters was such that it differed from the normal procedure on any inquiry as to whether a breach of the rules had occurred. At the Stewards inquiry on the 14 April 1997 both Appellants where given particulars of the charges laid against them and were referred to the specific rule that related to the charge. Each Appellant then pleaded not guilty.

There is no requirement in the rules nor is it standard procedure in such inquiries for the Appellants to be given written notice of the nature of the charge being laid against them. Each Appellant was present at the relevant parts of the inquiry where evidence was given which was considered by the Stewards to find them guilty of the charge. The transcripts of the various inquiries reveal that each Appellant was given a reasonable opportunity to respond to the charges upon them being informed that they had been charged. Upon each Appellant entering their pleas of not guilty, they were also given the opportunity to call further evidence if they so desired.

In relation to Appeal Ground 1.1 (5) each Appellant was not given opportunity to obtain legal advice in relation to the charges but there is no requirement under the rules or pursuant to the rules of natural justice that they be given such opportunity. In any event at the inquiry on the 14 April 1997 when the charges were made by the Stewards no request was made by either Appellant for the opportunity to obtain legal advice in relation to the charge against them.

With respect to the Appellant Currie, Appeal Grounds 1.1 (7-9) have been adequately dealt with in our reasons for decision concerning additional Appeal Grounds 2, 3 and 4, this is also the case concerning the original appeal grounds 1.1 (8-11) of the Appellant Harper.

With respect to Appeal Ground 1.1 (6) in relation to the Appellant Harper we can see no merit in this Ground. On the Appellant's own admission he was holder of a Trainers Licence with the Western Australian Trotting Association at the relevant time. There was ample evidence before the Stewards for them to draw a conclusion that the Appellant Harper was directly or indirectly involved with the training of horses at the Palm Lodge Racing Stable. In particular it was clear on the evidence that the Appellant Harper had access to various drugs kept at the stable for training the horses, drove the horses on occasions, and took horses to the track.

With respect to Appeal Ground 1.1 (7) we can see no merit in this ground as the Appellant Harper was not convicted as a registered owner but as a registered trainer and Rule 501A creates an offence if it contravened by either an owner or a trainer.

APPEALS AGAINST PENALTY

The grounds of appeal against penalty in respect of the first Appellant, Mr Harper, are as follows:-

"2. *The Stewards erred in their assessment of the appropriate penalty to be applied in disqualifying the Appellant for life and failed to consider (in the event that the Appellant was guilty as so charged which is denied in any event) that:-*

2.1 There was no evidence to suggest that any of the drugs had been administered to the Appellant's horses or horses under the Appellant's control other than under the supervision of Dr Kim Rose a veterinarian.

2.2 The Appellant did not seek to prevent the search of the premises taking place or to conceal the existence of any drugs.

2.3 The penalty imposed is too severe in that:-

(1) The Appellant stands to suffer financially as driving horses is the Appellant's only source of income.

(2) The Appellant has a dependent wife and 2 children aged 6 and 9 years respectively.

(3) The Appellant has financial commitments including a mortgage which can not be served whilst the penalty remains in place.

(4) The Appellant has numerous driving commitments and drives approximately 5 horses a week at various race meetings.

3. *The Stewards generally failed to take into account the extenuating circumstances of the case pursuant to Rule 55A of the Rules of Trotting.*

4. *The hearing of this Appeal should be stayed pending the outcome of the Full Court of the Supreme Court of Western Australia's decision involving disqualified trainer Mr Peter Anderson."*

The penalties to which Mr Harper was liable are as set out in Rule 55A:

"*Minimum Penalties - Part 42 (Administration and Detection of Drugs)*

55A: A person who is convicted of an offence under Part 42 of these Rules, or under Part XXXII of the Rules repealed by these Rules, is liable to a penalty which is not less than -

(a) in the case of a first such offence, a period of 12 months disqualification;

(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 referred to Mr Harper's previous convictions in the following terms:-

"A copy of your record shows that you've had no convictions under the Part 42 of the current rules. However, Part XXXII of the old rules or the rules repealed by the current rules, on the 5th of August 1993 you were found guilty of or convicted on two separate charges under the provisions of Rule 364(a) for Total Carbon Dioxide level. You appealed those decisions to the Racing Penalties Appeals Tribunal on the 6th of September 1993 and your appeal was dismissed.

You then appealed the decisions to the Supreme Court of Western Australia on the 8th of February 1995. The Supreme Court dismissed your appeals also. And they were two periods of eight months disqualification to be served concurrently.

There was another charge, which was quashed by the Appeals Tribunal. So we don't take any account of that.

And then on the 12th of January 1984, there was a conviction under the provisions of Rule 364(b) and you were disqualified for six months. And our records don't indicate that there was an appeal against that decision. I could stand corrected on that.

So it would appear that you have three previous convictions under Part XXXII of the old rules.

Which if that is the case, these would be your fourth or subsequent such offences, therefore, liable to a period of disqualification for life. Which quite obviously from your point of view is an extremely serious matter. And from the Stewards points of view we treat it equally as serious.

In view of that information, firstly, do you acknowledge that what I read out about your offences record is a true reflection.

Answer: Yes, that's correct. As for presenting horses to race that were found to have a drug in their system."

The Stewards were incorrect in their finding that Mr Harper should be dealt with under Rule 55A(d). For the purposes of penalty, this conviction was his third offence, two of the previous convictions having occurred on the same day, namely 5 August 1993. (*Carter -v- Denham (1984)* WAR 123.)

We next consider if there were any extenuating circumstances in respect of the case of Mr Harper. In our view the evidence before the Stewards establishes that Mr Harper was mistaken as to his legal and factual position under the Rules. Mr Harper had believed that Mr Rose owned the drugs and that was the end of the matter. Mr Rose's evidence corroborates Mr Harper's evidence in that regard. It was quite clear that Mr Harper did not consider he was doing anything wrong.

These factors go beyond mere mitigation, in our view, and ought to have been considered as extenuating circumstances. Accordingly, the Stewards in determining the appropriate penalty should have taken into account that there were extenuating circumstances in this case.

In our view the Appeal as to penalty by Mr Harper should be upheld. The matter should be referred back to the Stewards to reconsider the question of penalty in light of our findings that this was Mr Harper's third conviction and that there were extenuating circumstances in this case.

P. J. Hogan

PATRICK HOGAN, PRESIDING MEMBER

ROBERT NASH, MEMBER

John Prior

JOHN PRIOR, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.