NORTHERN TERRITORY RACING APPEALS TRIBUNAL

DATE: 28 August 2012

MEMBERS: Chairman: Mr John Birch SM

Deputy Chairman: Mr Geoffrey Clift

Member: Mr James De-Belin

APPELLANT: Mr Michael Robert McDuff

APPEARANCES: Mr Michael Robert McDuff self-represented and Mr David De-Silva for the Stewards

HEARING DATE: 28 March 2012

IN THE MATTER OF: An appeal by Michael Robert McDuff from the Stewards of Thoroughbred Racing Northern Territory against the penalty imposed in respect of a charge made against him under AR 81A (1) (b) of suspension for a period of 2 years.

DECISION: Ground of Appeal "D" is struck out, the Appeal is upheld in part and the decision of the Stewards of 14 January 2012 is varied so as to allow the appellant, during his period of suspension, to ride trackwork on and from 7 October 2012.

REASONS FOR DECISION

The appellant appeared before an Inquiry conducted by the Stewards of Thoroughbred Racing Northern Territory (the "Stewards") at Fannie Bay Racecourse on 7 January 2012 and 14 January 2012 (the "Inquiry"). At the conclusion of the Inquiry on 14 January 2012 the appellant was charged by the Stewards with one breach of Australian Rules of Racing ("AR") Rule 81A (1) (b). The particulars of the charge were that "on Saturday the 7th of January [2012], a race day when [the appellant] had riding engagements [the appellant] refused to deliver a sample as directed by the Stewards." (the "Charge") The appellant did not enter a plea to the Charge. The Stewards, on 14 January 2012, found the appellant guilty of the Charge and imposed a penalty of suspension for a period of 2 years (the "Penalty").

The appellant instituted an appeal to this Tribunal pursuant to section 145D of the Racing and Betting Act (the "Act") by lodgement of a notice of appeal dated 20 January 2012 (the "Appeal"). The notice of appeal contained 4 grounds of appeal. The grounds of appeal "A",

"B" and "C" challenged the Penalty as being excessive in all the circumstances. The ground of appeal "D" alleged that the Penalty was "vindictive and designed to discourage me from riding at Darwin in the future".

The Appeal was heard by the Tribunal as constituted by the Chairman, the Deputy Chairman and Member Mr De-Belin on 28 March 2012. On 28 March 2012 the Tribunal struck out ground of appeal "D ,upheld the Appeal in part and varied the Penalty so as to permit the appellant, during his period of suspension, to ride trackwork on and from 7 October 2012. The Tribunal, as constituted by the Deputy Chairman and Member De-Belin, the Chairman having post 28 March 2012 resigned from the Tribunal, now publishes its reasons for the decision made on the Appeal.

BACKGROUND TO THE APPEAL

AR Rule 81A (1) (b) is in the following terms:

"(1) Any rider commits an offence and may be penalised if;

(b) he refuses or fails to deliver a sample as directed by the Stewards, or tampers with or in any way hinders the collection of the sample."

AR Rule 1 defines "Rider" as "... a jockey, apprentice jockey. Amateur rider, approved rider, or any other person who rides a horse in a race, official trial, jump-out or during trackwork." And "Sample" as "...a specimen of saliva, urine, perspiration, breath, blood, tissue, hide, hair, or any other excretion product or body fluid taken from a horse or person."

On 7 January 2012, the appellant, a licensed jockey, arrived at Fannie Bay Racecourse in order to fulfil riding commitments during the race meeting to be conducted at the Racecourse that day. Upon his arrival at the Racecourse he was advised by a steward that he was required to provide a specimen of urine for the purposes of analysis for the presence of banned substances and that he was required to provide that specimen prior to his departure from the Racecourse later that day.

The appellant subsequently rode in Race 1 of the meeting. Upon weighing in at the conclusion of that race the appellant advised the Stewards that he could not ride again that day. Mr Lane, the Northern Territory Chairman of the Stewards, then had the following exchange with the appellant:

"Mr Lane: Michael McDuff, on the scales, you indicated that you wouldn't be able to ride for the rest of the day.

Appellant: I can't. Not again.

Mr Lane: Any reason why you can't ride?

Appellant: Handing my license in.

Mr Lane: Handing your license in?

Appellant: Yes because I can't ride under these rules. Thank you. I get horses beat with the whip rules here."

A further exchange occurred between Mr Lane and the appellant as follows:

"Mr Lane: Michael McDuff, come in. Have a seat. Michael Mc Duff, I'll give you a little while to get your composure back before we have any discussion-you're not in until Race 3, and I'll give you some time to give some thought to your actions, but before you go, I'll read you Australian Rule 85B:

Any jockey or apprentice jockey may be penalised if in the opinion of the Stewards he fails or refuses to fulfil a race riding engagement.

Okay? So I'll get you in just prior to the jockeys going out for Race 2, okay?

Appellant: No, Sir. Look for other jockeys.

Mr Lane: All right.

Appellant: Fine, do whatever you want. I'm not a jockey no more anyway.

Mr Lane: That's fine, and don't forget prior to your leaving the course you need to provide a urine sample.

Appellant: Yes

Mr Lane: Okay

Appellant: No worries.

Mr Lane: All right.

Appellant: But why do I have to do that and why do I have to get fined if I'm not a jockey no more, anyway?

Mr Lane: Well, as far as we are concerned you are a licensed jockey.

Appellant: No, I'm not because I handed my license in.

Mr Lane: You've accepted a riding engagement, or two riding engagements for the rest of the afternoon, and at this point in time, we're suggesting that you fulfil those riding engagements. We can't force you to. If you elect not to, then so be it and the Stewards will consider that if that's the decision you make. And irrespective of that, whether you fulfil those riding engagements or not, you'll be expected to deliver a urine sample before you go.

Appellant: Okay then.

Mr Lane: Okay.

Appellant: I can't get in any trouble. I'm not a jockey anyway so I can't get in trouble for not doing anything anyway."

The appellant, shortly after that exchange, left Fannie Bay Racecourse without providing the specimen requested by the Stewards. The Stewards, on becoming aware of that fact, commenced the Inquiry. The Inquiry was adjourned on 7 January 2012 and was resumed on 14 January 2012. The aforesaid exchanges between Mr Lane and the appellant were subsequently read into evidence in the Inquiry.

Upon the resumption of the Inquiry on 14 January 2012, the following, inter alia, was stated:

"Mr Lane: And you withdrew, and that was the last conversation we had with you on Saturday the 7th. Then whilst we were, in fact, running Race 2, you left the Jockey's room with your gear and left the course. Is that correct?

Appellant: Yes

Mr Lane: Any explanation?

Appellant: Yes. I was just frustrated and stressed out by everything that's happened, all these rules and all that kind of stuff. Plus, I had personal reasons. I was very frustrated.

Mr Lane: Sorry? There were other reasons?

Appellant: And some – just a few personal things as well.

Mr Lane: Well, you were told, by my reckoning, on at least three occasions that you were required to give a urine sample. Why didn't you give a urine sample?

Appellant: Because I left the racecourse because, as I just said, I was frustrated and stressed out and just so angry inside and because of rules.

Mr Lane: What, the rules in relation to giving urine samples?

Appellant: No, no- not at all. With the rules, the whip rules.

Mr Lane: The whip rules have been here for two years and..

Appellant: Yes, I'm not going there. I'm finishing please. So I left before I said anything wrong or did anything wrong.

Mr Lane: Well, it doesn't explain why you didn't give a urine sample before you left. Now, you might be frustrated and you might be upset about whip rules, but what's that got to do with giving a urine sample?

Appellant: Because I wasn't thinking properly and my head was just totally stuffed up and I just wanted to get out and get away before I said something wrong. That's why I didn't come to the other inquiry too, remember? That's why.

Mr Lane: Did you ask permission to leave the course before you left?

Appellant: No, I never. Never.

Mr Lane: Do you understand the seriousness of not providing a urine sample when requested?

Appellant: I did once I got home and settled down and all that kind of stuff, cleared my head a little bit.

Mr Lane: Because the powers that the Stewards have in relation to jockeys being required to or requiring jockeys to provide samples are there for not only the benefit of yourself, but the benefit of all the other riders, the horses and the industry as a whole.

Appellant: Yes, look I've got no worries giving one. I haven't. I was just-yes.

Mr Lane: Any questions from the Stewards?

Mr Merritt: No.

Mr Lane: Prior to us giving consideration to it, is there anything you wish..?

Appellant: I said on the day, I said: Yes, I'll give one no worries at all when you asked me that. You advised me and I said yes. I didn't say no to giving one at all.

Mr Lane: Well, you certainly did ask the question why you had to give one.

Appellant: Yes.

Mr Lane: And you indicated, also, that you didn't think you were required to give one because you weren't a jockey and you couldn't get in trouble if you didn't. That's as I understand it.

Appellant: Yes, well that's the way it goes. Yes,

Mr Lane: Right. Nothing further you wish to say?

Appellant: No."

The Stewards then determined to charge the appellant. The Charge was then put to the appellant as follows:

"Mr Lane: Have a seat Michael. Michael McDuff, I'll read you Australian Rule 81A (1) (b):

Any rider commits an offence and may be penalised if he refuses or fails to deliver a sample as directed by the Stewards or tampers with or in any way hinders the collection of such sample.

Do you understand that rule?

Appellant: Yes

Mr Lane: We, the Stewards of the TRNT, now charge you under Australian Rule 81A (1) (b), the details being that on Saturday the 7th of January, a race day when you had riding engagements, you refused to deliver a sample as directed by the Stewards. Do you wish to plead to the charge? You don't have to; you can reserve your plea.

Appellant: No Plea.

Mr Lane: No plea. Prior to us giving consideration to it, is there anything further you wish to put to the stewards?

Appellant: No.

Mr Lane: Nothing?

Appellant: No."

The Stewards then considered the appellant's guilt or innocence in connection with the Charge. The appellant was then, on 14 January 2012, called back to the Inquiry. The following was stated:

"Mr Lane: Michael McDuff, have a seat thanks. Michael McDuff, the Stewards considered it and do find you guilty as charged. Prior to us giving consideration to a penalty, if one is to be imposed, do you wish to address the stewards on penalty?

Appellant: No."

Mr Lane and the appellant then discussed prior charges brought and penalties imposed against the appellant in connection with AR Rule 81A.The following was stated:

"Mr Lane: In relation to prohibited substance rules, what's your record in relation to that? Not that good.

Appellant: No.

Mr Lane: I'll perhaps get your record out. In relation to the rules relating to 81, in 2001 you were suspended for three months under 81A for returning a sample positive to cannabinoids. In 2002 at Warwick Farm you were suspended for six months for returning a

positive to cannabis. Then in 2009 on three occasions – once at Canberra in November, once in Queanbeyan in December and again in Canberra at the end of December...

Appellant: No, the first one at Canberra was negative. The last two were positive and they were round that...

Mr Lane: I'll read what I've got here and you can give us your view on it. On 29/11/09, Canberra suspended 12 months, 81A returned positive to cannabis. On 7 December at Queanbeyan, suspended 12 months, return positive to cannabis, and then on 30/12/09, Canberra, suspended 12 months, return positive to cannabis. So tell me what you say in relation to that.

Appellant: No, they're wrong.

Mr Lane: They're not right?

Appellant: They're wrong.

Mr Lane: All of them?

Appellant: No, not all of them. I got swabbed three times in three weeks and the first one was clear. The second one I got done. And the other one was a week later, I got done. The first one I got 12 months for race riding and for the second one I got done 10 months for trackwork.

Mr Lane: All right. Is there anything further you wish to put to Stewards in relation to it?

Appellant: No."

Subsequently, on 14 January 2012, the Stewards imposed a penalty of 2 years suspension in connection with the Charge. In informing the appellant of the penalty, Mr Lane stated the following:

"Michael McDuff have a seat. Michael McDuff, just before I go to penalty, the Stewards – I want to say this: the Stewards are provided powers under the Rules to require riders to provide a sample so as to ensure the safety of the rider in question as well as the safety of fellow riders and horses. It is a significant power because if any rider is under the influence of a prohibited substance, it may impact their ability to properly control their horse, which may negatively impact the integrity and public confidence in racing as well as placing the safety of other riders and horses at risk.

It's our view that your refusal to provide a sample has eroded the level of control over the industry, which we consider a very serious breach of the Rules. We've considered precedents in other jurisdictions within Australia for similar breaches, some of which resulted in disqualification. The Stewards have taken this into account and have decided

that suspension of your Jockey's licence is a more appropriate penalty. The period of suspension which we consider appropriate is a period of two years...

Because you stood down from riding last Saturday, the Stewards deem that the penalty commenced last Saturday, 7 January. Do you understand that?

Appellant: Yes."

THE APPEAL

The Appeal was heard on 28 March 2012.

The notice of appeal sets out the following grounds of appeal:

"A. The penalty imposed by the Stewards is grossly excessive.

B. The offence of failing to comply with a direction of Stewards does not warrant a penalty to the extent of that imposed.

C. The Stewards have failed to take into consideration the circumstances under which the offence was committed and the state of mind of the appellant at the time of the offence.

D. The penalty imposed is vindictive and designed to discourage me from riding at Darwin in the future."

The notice of appeal also sets out numerous matters in the nature of submissions in support of the grounds of appeal.

Prior to the hearing of the Appeal solicitors acting for the Stewards wrote to the appellant by letter dated 29 February 2012 inviting the appellant to withdraw grounds of appeal "B" "C" and "D" stating, inter alia, that they were "irrelevant" and an "abuse of process". The solicitors also, in that correspondence, invited the appellant to withdraw ground of appeal "D" on the basis that it was "completely unsupported by the evidence" and was "inflammatory and unnecessary". The appellant subsequently wrote to the Secretary of the Tribunal enclosing a copy of that correspondence and outlining his reasons as to why the Tribunal ought entertain grounds of appeal "B" and "C" as being relevant in the context of the Appeal. In his correspondence to the Tribunal the appellant made it plain that the Appeal was not against the finding of the Stewards that the Charge was made out but rather that the Appeal was an appeal "against the severity only of the penalty".

At the commencement of the hearing of the Appeal, the issues raised in the correspondence from solicitors for the Stewards to the appellant and from the appellant to the Tribunal (collectively the "Correspondence") were ventilated. The Correspondence was adduced by leave of the Tribunal pursuant to section 145Z of the Act. The Tribunal considered that ground of appeal "D" should be struck out and so ordered.

The submissions set out within the notice of appeal essentially reiterate the statements made by the appellant to Mr Lane on 7 January 2012 and the evidence given by him at the Inquiry, namely that he left Fannie Bay Racecourse on 7 January 2012 without first providing a urine specimen because he was upset and angry due to frustration felt by him on the day as to the application of the whip rule in respect of himself by the Stewards over an extended period. In those submissions the appellant also states: that he did not leave Fannie Bay Racecourse so as to avoid providing a urine specimen; that he did not have the intention of refusing to provide a urine specimen when he left Fannie Bay Racecourse and that he had not "used drugs prior to attending the race meeting". The appellant submitted that taking into account those matters, and taking into account the fact that he had been charged for failing to fulfil all his riding commitments on 7 January 2012 and fined $1,000 in respect of that charge and taking into account the financial hardship faced by him as a consequence of the Penalty, the Tribunal should reduce the Penalty and impose a suspension "of no more than six months". In that regard, the appellant also submitted that "a conviction for failing to supply a specimen should be treated no more seriously that (sic)returning a positive reading and the penalty imposed should not be in excess of that which would have been imposed had I returned a positive reading."

At the hearing of the Appeal, the appellant adduced evidence, with leave, in the nature of a document titled "Instant Urine Drug & Alcohol Screen" dated 17 January 2012 compiled by Carpentaria Medical Centre. That document detailed "Screen Results" indicating that the urine sample taken for the purpose of urinalysis was "Negative" for "cocaine", "marijuana", "opiates", "amphetamines", "benzodiazepine" and "methamphetamine" and contained "0%" "alcohol". The appellant's evidence was that the urine sample the subject of the "Screen Results" was given by him on 17 January 2012. The appellant also adduced evidence, with leave, in the nature of a document titled "Pathology Report" dated 24 January 2012 compiled by Western Diagnostic Pathology". The document refers to a "Urine Drug Screen" with a "Collection Date" of 19 January 2012 and a "Date of Analysis" of 20 January 2012. The document records that the "Result" in connection of testing of the urine sample was "Not Detected" in connection with "alcohol", "amphetamine type substances", "barbiturates", "benzodiazepines", "cannabinoids", "cocaine", "methadone" and "opiates". The appellant's evidence was that the urine sample the subject of the "Urine Drug Screen" "Results" was given by him on 19 January 2012. The appellant also gave evidence at the hearing, with leave, that he left Fannie Bay Racecourse at approximately 4.30 PM on 7 January 2012 and that he had "calmed down" at his home by approximately 5.30 PM on that day. He also gave evidence, with leave, that he had left the Racecourse without providing a urine specimen partly because of his state of mind arising from "problems at home" and "problems with trainers and owners". He also gave evidence, with leave, that, after speaking to other persons in the racing industry post 14 January 2012 he had reversed his decision as regards ending his career as a jockey. He gave evidence, with leave, that riding was his livelihood and thus his sole means of obtaining an income.

In oral submissions to the Tribunal the appellant submitted that the Penalty, if not reduced, would effectively end his career as a jockey due to his age. From evidence before the Tribunal the appellant is now 43 years of age.

The Stewards adduced evidence to the Tribunal at the hearing of the appeal, with leave, as regards penalties previously given to the appellant in connection with breaches of AR Rule 81A and other Rules via a document titled "Licence History – Detailed". Of relevance to the Appeal were the following breaches and penalties imposed in connection therewith recorded in that document:

"23/2/01 – Drwn Susp for 3 MONTHS from riding in Races and Trials. AR 81A (ii) returned a sample Positive to CANNABINOIDS

27/05/2002 – Warwick farm Susp for 6 months AR 81A (ii) returned a positive to Cannabis

29/11/09 – Canberra Susp 12 months (2 mths susp) AR 81A (1) (a) returned positive to Cannabis

7/12/09 – Queanbeyan Susp 12 months (2 mths susp) AR 81A (1) (a) returned positive to Cannabis"

On questioning by the Tribunal as regards the accuracy of the charges and penalties in connection with breaches of AR Rule 81A as recorded in that document, the appellant conceded only that he had been suspended in connection with such breaches on 3 prior occasions.

Also of relevance to the Appeal is evidence contained within the document titled "Licence History – Detailed" that in the period 21 July 2007 to 31 December 2011, the appellant was charged by the Stewards and penalised on a total of 9 occasions with breaches of AR dealing with the use of a whip during races.

In oral submissions to the Tribunal Mr De Silva submitted that the Penalty imposed was appropriate in all the circumstances having regard to the seriousness of the breach of AR Rule 81A (1) (b), the need for personal deterrence in the context of 4 previous breaches of AR Rule 81A (1) (a) by the appellant vis a vis the use of cannabis and considerations of general deterrence. In connection with the objective seriousness of the breach of AR Rule 81A (1) (b) and the tariff for breaches thereof, Mr De Silva relied upon a determination of the Racing Penalties Appeal Tribunal of Western Australia in the matter of an appeal by Paul Fahy dated 29 November 2005.

DETERMINATION OF THE APPEAL

The Appeal is in the nature of a rehearing as distinct from an appeal in the strict sense or an appeal in the nature of a hearing de novo. Absent express or indicative statutory provisions to the contrary an appellant must demonstrate legal, factual and/o discretionary error if the

appeal is to be successful (refer Coal And Allied Operations Pty Ltd v Australian Industrial Relations Commission and Others (2000)203 CLR 194 and Allesch v Maunz (2000) 203 CLR 172). We are of the view that no such provisions appear in the Act. As such the appellant bears the onus of persuading us that the decision of the Stewards to impose the Penalty was infected with legal, factual and/or discretionary error on the part of the Stewards. We will not intervene and exercise our powers as set out at section 145ZE of the Act in favour of the appellant unless we are satisfied that relevant error has been demonstrated.

Ground of appeal "A"- The Penalty is grossly excessive

We take this ground of appeal to be an assertion that the Penalty was manifestly excessive in all the circumstances in that it is apparent that it is plainly unreasonable and/or unjust.

Specific error need not be identified by the appellant to have the Tribunal uphold this ground of appeal. (refer House v The King (1936) 55 CLR 499 and Dinsdale v The Queen (2000) 202 CLR 321).

We view any breach of AR Rule 81A (1) (b) as objectively serious. AR Rule 81A as a whole is primarily protective. The safety of all riders and horses is one focus of the Rule. The presence of banned substances in the systems of riders can impair their judgement, concentration and their ability to properly physically control the horses they ride, thus increasing the already present risk of significant injury to themselves, the horse they ride and other riders and horses. However, the Rule is also directed towards the preservation of public confidence in racing. Not only does the presence of banned substances in the systems of riders, such that they may impair judgement, concentration and the ability to properly physically control horses, have a tendency to undermine public confidence in racing, failure or refusal by riders to deliver a sample for testing for such banned substances when requested also has the tendency to undermine public confidence in racing. The public may conclude that a failure or refusal to deliver such a sample was motivated by a desire to avoid a positive test being recorded on testing of any sample if delivered and that the rider was in fact not in a position to have exercised appropriate care and skill. The Tribunal endorses the statements in the Fahy determination as regards the objective seriousness of breaches of the AR Rule 81A and the statement in that determination that such a breach is to be "considered as serious an offence as that where a jockey or track rider is found to have a prohibited substance in the sample which could directly impair his or her ability to ride a horse".

We do not find that the appellant had in his system on 7 January 2012 any banned substances. However, we are of the view that the breach of AR Rule 81A (1) (b) is to be viewed as objectively seriously as a breach of AR Rule 81A (1) (a) involving the presence of a banned substance capable of directly impairing a rider's ability to ride a horse.

We are not assisted by the results contained in the documents compiled by Western Diagnostic Pathology and Carpentaria Medical Centre in determining positively that the appellant did not have the substances referred to in those documents in his system on 7 January 2012. The urine specimens the subject of those documents were not given until some 10 to 12 days after 7 January 2012 respectively. The results obtained cannot conclusively rule out the presence of the substances tested for in the appellant's system on 7 January 2012.

The Tribunal places no weight upon the appellant's submissions that he had no intention of refusing to provide a urine specimen when he left Fannie Bay Racecourse on 7 January 2012 and that he did not do so so as to avoid providing such a specimen. Those matters may have been relevant upon an appeal against the Stewards' decision to find him guilty of a breach of AR Rule 81A (1) (a) but are not matters that are relevant to this Appeal. In any event, the appellant's voluntary actions in leaving Fannie Bay Racecourse without providing a specimen, and his later evident decision not to return to provide the same even when he had "calmed down" by approximately 5.30 PM on the day in question, had the effect that a specimen was not provided.

We accept that the appellant was upset, frustrated, agitated and angry when questioned by the Stewards on 7 January 2012 and when he later left Fannie Bay Racecourse. We also accept that this state of mind stemmed both from previous charges brought against him by the Stewards and from problems that he had had "at home" and with "owners and trainers". We make no finding as to whether or not his anger, frustration and agitation was or was not understandable in light of previous charges brought by the Stewards against him.

We do not accept that the fact of a concurrent charge under AR Rule 85B and the imposition of a penalty of a fine of $1,000 in connection therewith is a relevant matter to be taken into consideration on the Appeal. The appellant contends that both that charge and the Charge stem from "the one act, my leaving the racecourse" and contends that that "one act" "constitutes both offences". The appellant seemingly contends that he has been punished twice for the same course of conduct. We reject that contention. Whilst it is true that that charge and the Charge arose out of substantially the same factual matrix they are separate and distinct. That "one act" was merely the backdrop to the conduct charged in both instances. The failure or refusal under each charge is not the same. The Charge relates to a refusal to provide a urine specimen whilst the charge in connection with AR 85B relates to a failure or refusal to fulfil riding commitments. Both charges may have been evidenced in part by that "one act" but that does not mean that it constituted both in the sense of being an essential element of them.

Mr De- Silva adduced to the Tribunal, with leave, a spreadsheet setting out details of penalties handed down by the Stewards since 1994 in connection with charges under AR Rule 81A (1) (a) concerning the presence of cannabinoids in specimens taken from jockeys. The spreadsheet details also whether or not the jockey in question had had a previous

charge and penalty or previous charges and penalties for the same offence. The spreadsheet was adduced as evidence of a suitable range of penalties imposed for similar offending as in the present case. We find that such material is of very limited assistance to us on the issue of an appropriate range of penalty for an offence against AR Rule 81 A (1) (a) as very scant details of the offence and the offender are disclosed.

We accept that a suspension of 2 years may be an appropriate penalty to impose as regards a breach of AR Rule 81A (1) (b) per se and thus a penalty of that type and magnitude may not always be seen as being manifestly excessive per se. In the circumstances of the offence committed by the appellant and taking into account his personal circumstances and relevant antecedants we do not consider that the Penalty fell outside the range of appropriate penalties properly available in the just and reasonable exercise of the discretion reposed in the Stewards. We do not consider the Penalty to be manifestly excessive.

This ground of appeal is dismissed.

Ground of appeal "B"- The offence of failing to comply with a direction of Stewards does not warrant a penalty to the extent of that imposed

Properly understood, this ground of appeal is but a particular of ground of appeal "A" (refer Dinsdale v The Queen supra). In any event this ground of appeal is dismissed.

Ground of appeal "C" – The Stewards have failed to take into consideration the circumstances under which the offence was committed and the state of mind of the appellant at the time of the offence

Relevant error may be found as regards the exercise of the sentencing discretion reposed in the Stewards if they acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect them, mistook the facts or if they failed to take into account some material consideration (refer House v The King supra and Dinsdale v The Queen supra).

It is encumbent upon the Stewards to give full reasons for decisions they make as regards findings of guilt in connection with charges laid by them and as regards penalties imposed by them in respect thereto. Nowhere in the transcript of the Inquiry does it appear that the Stewards took into account all the matters put by the appellant in mitigation of penalty. Specifically, nowhere does it appear that the Stewards took into account the personal problems adverted to by the appellant at the Inquiry. It may in those circumstances be assumed that those matters were not considered. The Stewards were in error in so doing (refer Mallet v Mallet (1984) 156 CLR 605 and Mobasa Pty Ltd v Nikic (1987) 47 NTR 48). The matters put forward by the appellant were material considerations.

We uphold this ground of appeal.

Ground of appeal "D" – The penalty imposed is vindictive and designed to discourage me from riding at Darwin in the future

If evidence existed to support the allegation that the Stewards were motivated by spite towards the appellant in imposing the Penalty and had as a consideration in imposing the same a desire to force, or at least encourage, the appellant to resume his riding career outside of the Northern Territory, then such evidence, if accepted by us, would justify the conclusion by us that the Stewards had erred in the exercise of their sentencing discretion. In those circumstances the Stewards would clearly have allowed extraneous or irrelevant matters to guide or affect them (refer House v The King supra).

No evidence was adduced by the appellant at the Inquiry to support this allegation. The appellant did not seek leave to adduce any evidence in support of this ground at the hearing of the Appeal. In those circumstances we were satisfied, at the commencement of the hearing of the Appeal, that this ground of appeal was hopeless and bound to fail. We struck out the ground of appeal on the basis that it was in that context scandalous and vexatious (refer Attorney-General v Wentworth (1988) 14 NSWLR 481 and Manolakis v Carter [2008] FCAFC 183).

VARIATION OF THE PENALTY

Having found error on the part of the Stewards, we are able, in the proper exercise of our powers pursuant to section 145ZE of the Act, to review the Penalty in light of the evidence adduced at the Inquiry and on the Appeal.

We consider that the Penalty imposed is, in the circumstances of the appellant and the offending, too severe.

This is so even allowing for the fact that the appellant is not entitled to the leniency he would otherwise be entitled to in the context of mitigating factors given the number of prior findings of guilt in connection with breaches of AR Rule 81A (1) (a), whether they be 4 as pressed by the Stewards or 3 as conceded by the appellant.

The appellant's state of mind at the time of the offending must be given some weight. We accept that the appellant was on 7 January 2012 in a state of agitation and turmoil due to a number of stressors and accepts that that state of mind led him to leave Fannie Bay Racecourse without providing a specimen. We accept that, to that extent, his actions were less culpable than they otherwise might have been had a calculated decision have been taken by him to leave so as to avoid providing a specimen that he knew or suspected would prove to be positive to the presence of a banned substance or substances. We reject the submission of Mr De-Silva that no or little weight ought be accorded to the appellant's alleged state of mind because the evidence showed that he had showered before leaving Fannie Bay Racecourse. That was said to be indicative of a calculated decision to so leave rather than an impulsive one brought about by a culmination of numerous stressors as submitted by the appellant. We do not find it inconceivable or surprising that the

appellant's agitation and turmoil would have continued notwithstanding him taking a little time to shower before continuing with his decision to leave the Racecourse.

We also consider that the appellant's age militates against the imposition of the Penalty in that the fact that the entire period of suspension relates to all types of riding work means that in all probability the appellant will be lost to the industry. We consider that it is most unlikely that the appellant at 43 years of age could, at the age of 45 years, return to the industry as a rider if he could not continue riding in some capacity.

Accordingly, taking into account all of those matters, we propose to vary the Penalty so that the appellant may continue to earn a livelihood within the racing industry during the period of suspension and so that he may have the opportunity to resume race riding at the end of that period. The Penalty is varied such that upon the appellant serving 9 months of the suspension he will be able to ride trackwork. We consider that the Penalty, as varied, is a sufficient penalty that serves the necessary interests of general deterrence, specific deterrence, protection of all riders and horses and protection of the interests of the racing industry in the preservation of public confidence in it.

ORDERS

The Appeal is upheld in part.

Pursuant to section 145ZE of the Act we make the following Orders:

1. Ground of appeal "D" is struck out.
2. The period of suspension imposed by the Stewards is upheld but the Penalty is varied to allow the appellant to only ride trackwork after completing the initial 9 months of the period of suspension.

Mr Geoffrey Clift

Deputy Chairman

Mr Geoffrey Clift

Deputy Chairman

For and on behalf of

Mr James De-Belin

Member