THE RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION AND REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT:	**GORDON WILLIAM O'DONNELL**
APPLICATION NO:	**A30/08/605**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A E MONISSE (MEMBER)**
DATE OF HEARING:	**30 MARCH 2004**
DATE OF DETERMINATION:	**30 APRIL 2004**

IN THE MATTER OF an appeal by Mr GW O'Donnell against the determinations made by Racing and Wagering Western Australia (RWWA) Stewards of Thoroughbred Racing on 9 October 2003 imposing the following penalties to be served concurrently:

1. **5 years disqualification for breach of ARR 175(hh) – possession of an electrical handpiece**
2. **5 years disqualification for breach of ARR 175(hh) – possession of an electrical saddle blanket**
3. **2 years disqualification for breach of ARR 175(hh)- possession of a cattle prodder**

Mr TF Percy QC with Mr A Rowe, instructed by Laurie Levy, Barristers & Solicitors, appeared for the appellant.

Mr RJ Davies QC appeared for the RWWA Stewards of Thoroughbred Racing.

BACKGROUND

On 1 August 2003, Racing and Wagering Western Australia (RWWA) Stewards of Thoroughbred Racing went to the registered stables of Mr O'Donnell, situated at 1118 Great Northern Highway, Baskerville, to carry out a search. Mr O'Donnell is a licensed thoroughbred trainer and owner. He has been licensed as a trainer for approximately 20 years. Leading the investigation was Mr O'Reilly, who is both the RWWA Racecourse Investigator and a Special Police Officer stationed at the Western Australian Turf Club. Others in attendance were Senior Stipendiary Steward Brian Nalder, Cadet Steward Simon Thomas, and Turf Club Security Officer Steven Knights. A video interview was conducted with Mr O'Donnell, and a search was conducted. The results of the search process were also recorded on video.

Mr O'Donnell was present throughout the search. His wife, Dianne O'Donnell, who is also a registered owner, was not present. Another person, Mr Kosanovic, was at the property and in the vicinity from time to time.

During the search, four items of interest were located and seized. They were tendered as exhibits at the Stewards' inquiry, and three of them later became the subject of the charges against Mr O'Donnell. The items, their location and the charge relating to each were as follows:

Item	Exhibit No	Location	Charge No (T86)
Cattle prodder.	B	In a plastic container in the workshop (T47)	3
Double A battery size device, blue in colour, black base, lackey band, one side empty, wiring underneath. Small blue item about the size of a cigarette lighter. 2 big holes in the top.	C	In a kitchen cabinet in the kitchenette in the house (T48)	Not applicable because not charged
Jack. Electrical hand device, black taped. Size of a cigarette lighter.	D	In a metal or jewellery box (T43) in a drawer of a dresser in the main bedroom of the house (T31,T49)	1
Horse saddle blanket. Batteries contained, wiring to plates each side.	E	In a wardrobe in a second bedroom in the house (T49)	2

Following the search and seizure, the Stewards opened an inquiry. The inquiry commenced on 11 August 2003, and there were 6 different sitting days. At the third sitting, on 5 September 2003, Mr O'Donnell was charged with three offences (T86). Each was a charge that at the relevant time and place he had in his possession an electrical apparatus, capable of affecting the performance of a horse in a race or training gallop. Charge 1 related to the black taped hand jack, charge 2 related to the electric saddle blanket, and charge 3 related to the cattle prodder. Mr O'Donnell pleaded not guilty to each charge. He denied knowing that the black taped hand jack and the electric saddle blanket were in the places where they had been found. He said he had never seen them before. As to the cattle prodder, he said that he was allowed to have it because he used it on cattle. On the last sitting day of the inquiry, 9 October 2003, the Stewards found Mr O'Donnell guilty of each charge.

Mr O'Donnell was not charged in relation to the blue battery sized device. At the sittings up to and including 5 September, the blue battery sized device was relevant as being possibly the subject of a charge. Thus, it was in evidence simply as one of the three items of interest, which had been found in the house. At the three sittings after 5 September, the blue battery sized device became irrelevant to the inquiry.

GROUND 1

Ground 1 of the appeal is in the following terms:

1. *The Stewards erred in treating as admissible the evidence resulting from the search of the Appellant's residential premises on 1 August 2003.*

Particulars

(1) *The search of the Appellant's residential premises was not authorised under the provisions of Rule 8B of Rules of Racing.*

(2) *The residential premises were not part of any premises used in relation to the Appellant's licence.*

(3) *Specifically the search of the personal property and effects of the Appellant's wife was unauthorised and illegal.*

(4) *The items said to have been electrical appliances were accordingly obtained improperly and should not have been admitted into evidence at the Inquiry.*

(5) *The Stewards' interpretation of the word "premises" as meaning residential premises unconnected with the Appellant's licence was erroneous.*

(6) *The evidence of the search of the Appellant's residential premises and the physical items seized in the course of the search were improperly obtained and should not have gone into evidence.*

There is no doubt that the Stewards had a discretion to not admit the items into evidence at the inquiry, if they were to find that they were obtained improperly during the search. That rule is most often applied in criminal cases, but the rationale has equal application in any case of sufficient seriousness. If the evidence has been obtained in an improper way, the only way to protect the proper processes of the Stewards' inquiry and the Tribunal may be to disallow the evidence. In *Strempel* (Appeal 549 determined on 21 February 2002) I said at page 7:

> *"Evidence which is otherwise relevant to an issue in dispute can be excluded or given little weight in the exercise of a discretion. The discretion is most often exercised in criminal cases. (Cross on Evidence Paragraph 11125)."*

And later:

> *"That there is a discretion in courts to exclude evidence on grounds of public policy has been recognised in such cases as* ***Ridgeway -v- The Queen*** *(1994 - 1995) 184 CLR 19, and* ***Pavic -v- The Queen; The Queen -v- Swaffield*** *(1998) 192 CLR 656. The rationale behind that policy is that courts have an implied power to protect their processes. (****Ridgeway -v- The Queen*** *per Mason CJ, Deane and Dawson JJ at page 31). That same rationale and principle can be applied to the processes of this Tribunal..."*

It is self evident that the discretion can only be exercised if in fact the items were obtained improperly. This ground of appeal complains of the search of the house, and in particular the bedroom which contained Mrs O'Donnell's personal effects. It is that part of the search which the Appellant says was not authorised, and was improper.

Mr O'Reilly said that his search was authorised by ARR 8B (T33). Mr O'Donnell challenged that, and put his interpretation of the rule (T50). At the inquiry, the Stewards made no finding on the lawfulness or otherwise of the search of the search.

ARR 8B is in the following terms:

> *The Stewards shall have the power at any time to enter upon the premises occupied by or under the control of a licensed person and used in any manner in relation to any licence (herein referred to as the premises) to:*
>
> *(i) Inspect and search the premises and also search any licensed person thereon.*
>
> *(ii) Examine any horse, take possession thereof and cause such horse to be-*

(a) removed from the premises and detained; or
(b) confined to, or otherwise detained at, or within, the premises-

for such period and on such terms and for such purposes as they consider necessary.

(iii) Examine the premises and any article or thing situated thereon and take possession of any article or thing found as the result of such search and remove from the premises any article or thing of which possession has been taken and retain the same for such period as Stewards consider necessary under these Rules.

Provided that the onus of proof that the premises are not being used in any manner relating to any licence shall be upon the licensed person who has the occupation or control of the premises and the use thereof.

"Premises" is defined in ARR 1 as follows:

"Premises" includes land, buildings or any fixed or moveable structure, including any vehicle.

We were told at the hearing of this appeal that 1118 Great Northern Highway, Baskerville is one piece of land, and it has improvements on it. In all of the evidence and on all of the documents, including the notice of appeal to this Tribunal, Mr O'Donnell gives his address as 1118 Great Northern Highway, Baskerville. On the piece of land, the improvements comprise a number of buildings, used for different purposes. One of the uses of the land is the stabling of the horses owned and trained by Mr O'Donnell. At T2, at the very beginning of the inquiry, Mr O'Donnell said that 1118 Great Northern Highway, Baskerville was his training establishment. Another of the buildings on the land is the house where the 3 items mentioned above were found.

The location of the buildings is evident from the photographs tendered at the inquiry on 22 August. In addition to the house, the buildings include a large shed used in Mrs O'Donnell's rug manufacturing business, a shed used in Mr O'Donnell's pest control business, and the stables used for the horses. The house is approximately 50 metres from the other buildings on the land. The cattle prodder was found in a plastic storage container in Mr O'Donnell's shed. The blue battery sized device (not charged), the black taped hand held electrical device, and the electrical saddle blanket and were found in different rooms in the house.

In my opinion, ground 1 must fail for a number of reasons.

1. The use of the house.

Mrs O'Donnell said that the living quarters for her and her husband were next to the shed (T41). She said that they did not eat or live in the house, except for sleeping and showering (T42 and T44). She said that previously, the house had been used to house the apprentices (T44). She said that they had Mr O'Donnell recently applied for the house to be turned into a restaurant (T44). Mr O'Donnell himself said that they used the house only for sleeping and showering (T48). He said that he primarily lived in the quarters at the shed (T49). He said that the house had been used to house apprentices, but had not been put to that use for some time (T50). He said that he had just applied to turn the house into a restaurant (T50). In support of his contention that he did not live in the house, Mr O'Donnell produced evidence that there was no food in the pantry and the fridge (T48, exhibits Q and R). He established through questions of Mr O'Reilly that there was an office and a desk in the quarters at the shed (T30).

The evidence about the use of the house was given by Mr O'Donnell in an attempt to distance himself from its use in relation to his licence. He thought the point was that because he did not live

in the house, it was not being used in relation to his licence. That is evident from his submission at T50:

> *"I submit to you that this part of my property is no longer used in relation to conduct of my licence, unless you consider showering and sleeping as part of my licence."*

Mr O'Donnell's submission that he did not live at the house, other than to sleep and shower, asserts a distinction without a difference. He had no other place where he slept and showered. Further, the ground of appeal itself and the particulars describe the house as his residential premises.

Mr O'Donnell's argument at the inquiry was also self-defeating when considering the argument put on the hearing of this appeal. He was inviting the Stewards to find that if he did live at the house, then it was being used in relation to his licence. That is contrary to particular 2 of ground 1, namely that the "residential premises" were not used in relation to his licence.

In my view, there was a sufficient factual relationship between the house and the other parts of the property to accurately describe the house as being used "in relation to" Mr O'Donnell's licence. It would be artificial to find otherwise. The evidence shows that Mr O'Donnell moved freely between the house and the stables area as part of his training activities. He summed it up himself, at T124:

> *"Look I, I can't answer that Mr Lewis. As I said my day starts at four in the morning and sometimes I don't get home until six in the evening. Now and again I drop back in check on the horses, make sure the kids alright, then I'm off again."*

The search of the house was therefore authorised. The search of the personal property of Mr O'Donnell's wife was part of the search of Mr O'Donnell's personal property, because the personal property of both of them was intermingled. They both had their clothing in the drawers in the dresser in the bedroom. It makes no difference that Mr O'Donnell's wife's personal property was in one of the drawers, and his was in another.

2. Definition of "Premises".

The search of the house was authorised because the house and the training establishment are on the same land. They are both improvements erected on the same land. This ground of appeal attempts to differentiate between residential premises and other premises on the same piece of land. No such difference is provided for in the rules.

3. Used in a lawful or unlawful manner.

The house was being used for the storage of the 3 items found during the search. They were clearly items under the control of Mr O'Donnell, because it was the house jointly occupied by him and his wife. The items were under his control in relation to his licence, because the items relate to horses and he is licensed to train horses. Counsel for Mr O'Donnell submitted that the search would only be authorised where the premises are used in any lawful manner in relation to a licence, as opposed to an unlawful manner such as storing unlawful devices. In my opinion, that could not be so. The whole purpose of the entry power is to permit searches in order to discover whether there is any unlawful use of the property, which is what occurred here.

There is no factual basis to find that the search led to the items being obtained improperly by the investigating Stewards. I would dismiss ground 1.

GROUND 2

Ground 2 of the appeal is in the following terms:

> 2. *The Stewards erred in failing to –*

(1) deal separately with the elements of each of the charges against the Appellant;

(2) make sufficient specific findings of fact in respect of each of the separate charges; and

(3) give adequate reasons for their decision to convict the Appellant of the offences.

The relevant part of Rule 175 is in the following terms:

A.R 175. The Committee of any Club or the Stewards may punish;

(hh) Any person who uses, or has in his possession, any electric or electronic apparatus or any improper contrivance capable of affecting the performance of a horse in a race or training gallop.

In order to find Mr O'Donnell guilty in the circumstances of this case, the Stewards had to be satisfied to the required standard of the following elements:

(1) that Mr O'Donnell had possession;
(2) that the item in question was an electric apparatus or an improper contrivance; and
(3) that the particular apparatus was capable of affecting the performance of a horse.

As to element (2), it is true that the Stewards did not give this separate consideration. That is probably because it was self-evident. The Stewards caused each item to be examined by an expert, namely Sergeant Davis. Sergeant Davis is a Police Officer, attached to the Police Electronics Support Unit. He holds a diploma in electronic engineering, with 18 years experience. His experience includes 15 years as an electronics specialist with the W.A. Police Service. On 11 August (T9), his report was tendered as exhibit F.

Sergeant Davis in his report said that the cattle prodder and the saddle blanket both had flat batteries. He replaced the batteries for the purpose of testing. The black taped hand held device did not have flat batteries (T18). On testing each item, he was able to produce a high voltage visible and audible blue arcing when brought into close proximity to conductive material. Sergeant Davis gave oral evidence on 22 August. He did not say that the devices were electrical apparatuses. In my view, there was ample evidence before the Stewards that each item was an electric apparatus. Because it was not a subject of dispute at the hearings, there was no reason to give it separate consideration. Further, it was a self-evident fact.

As to elements (1) and (3), the Stewards did in fact deal with each of them and give reasons. Over 2 pages at T143 to T144, the Stewards gave reasons for their finding that the items were capable of affecting performance. Over 3 pages at T144 to T147, the Stewards gave reasons for finding that Mr O'Donnell had possession.

It was submitted on behalf of Mr O'Donnell that that the Stewards should have given reasons which applied the evidence to each individual item. So far as the element of possession is concerned, the Stewards did in fact refer to the location of each item, and the reasons why they did not accept Mr O'Donnell's denial of knowledge. They also gave reasons why the evidence satisfied the element of "intent to possess" in relation to each item. It was also submitted that the Stewards failed to give any reasons for not accepting Mr O'Donnell's explanation in relation to the cattle prodder. Indeed, the Stewards did not deal with that issue, nor was it clearly dealt with at the hearing of this appeal. That is a matter to which I shall return at ground 4. For present purposes, it is enough to say that Mr O'Donnell's explanations were rather by way of justification and excuse, instead of a missing element of offence number 3.

I would dismiss ground 2. It is based on an incorrect factual premise, namely that the Stewards did not deal with the elements and give reasons.

GROUND 3

Ground 3 of the appeal is in the following terms:

> 3. *The Stewards erred in failing to consider or to apply any proper test of what constituted an "...electric or electronic apparatus or any improper contrivance capable of affecting the performance of a horse..." for the purposes of the relevant rule.*
>
> ***Particulars***
>
> *(1) The clear meaning of the rule is to penalise items that infringe the rule at the time and in the state that they are found in one's possession.*
>
> *(2) The rule does not apply to items that with some degree of rectification could be seen to infringe the rule.*
>
> *(3) The proper test to be adopted in respect of each item was whether in the state in which it was found it infringed the rule.*
>
> *(4) The Stewards erred in addressing the question by reference to whether the items the subject of charges 2 and 3 would with the addition of fresh batteries have offended the rule.*
>
> *(5) The Stewards further erred by failing to address the question of whether the cattle prodder the subject of charge 3 was a prohibited device in the dissembled state in which it was found.*

This ground challenges the finding that each of the two items with flat batteries was capable of working because the flat batteries simply had to be replaced. Ground 3 also challenges the finding that the cattle prodder was capable of working simply because it only had to be re-assembled.

The Stewards heard evidence from Dr Medd, the RWWA Veterinary Steward. Dr Medd saw the items, and said that if an electric shock was emitted by each of them, that shock would be capable of stimulating the nervous system of a horse (T58). The instinctive reaction would be to try to move away from it, because it is an irritating sensation. At T58 Dr Medd said:

> *"Depending on the conditioning of the horse to that and also where the horse is at the time, for instance if the horse is exercising, if it was moving in a forward direction and it received an electric shock then I would imagine that it would continue to move forward, perhaps at an accelerated rate because it would be thinking I'm going to run away from this sensation because it's unpleasant."*

The Stewards accepted both Dr Medd's evidence and Sergeant Davis' evidence in coming to their conclusion that the devices were capable of affecting performance (T143 to T144). In accepting Sergeant Davis' evidence, the Stewards said at T144:

> *"In any event, the Stewards believe that should the electric saddle blanket and prodder be totally flat, it would be a simple process of replacing the batteries."*

Sergeant Davis had explained that he used the word "flat" as a technical term (T20). The cattle prodder and the saddle blanket were not capable of working to their full capacity, and the piece of paper had to be removed from the hand held device in order for it to operate (T21).

In their reasons for decision, the Stewards referred to the evidence of both Dr Medd and Sergeant Davis. They said at T144:

"After considering this evidence, and that given by Dr Judith Medd on pages 58 and 59, we are of the opinion that there is overwhelming evidence that these three devices are capable of affecting the performance of a horse in a race or training gallop."

The Stewards' reasoning process was correct. An apparatus capable of discharge of electricity (Sergeant Davis' evidence) and then capable of affecting performance (Dr Medd's evidence) does not change its character simply because the batteries are flat, or the piece of paper preventing contact has to be removed, or it has to be put together. In each case, it will be a question of fact whether the character of the item has been changed by some alteration. In this case, the draining of the batteries could not be said to be an alteration to the character of the item. Indeed, the process of the batteries going flat could be said to demonstrate that the items were working properly, if it they had been discharged by use rather than the passage of time. The insertion of a piece of paper preventing contact could be said to demonstrate that the item was working properly, and the paper only had to be removed for contact to be made. It had only been placed there to prevent accidental discharge. The assembling of the cattle prodder from 2 pieces into one simply means that it had been stored in a disassembled fashion. We saw the item at the hearing of this appeal. It is similar to many common electrical items to be found at a hardware store, in that it comes in two parts, and it is joined together in order to use it.

In ***Beaton -v- Wray-Watts*** *[2003] WASCA 314*, delivered 15 December 2003, Pullin J considered whether the firearm the subject of the appeal in that case was properly described as a firearm. His Honour considered the application of section 4 of the ***Firearms Act***, which is in the following terms:

*'Firearm' includes any lethal firearm and any other weapon of any description from which any shot, bullet, or other missile can be discharged or propelled or which, **by any alteration in the construction or fabric thereof**, can be made **capable of discharging** or propelling any shot, bullet or other missile...' (emphasis added).*

His Honour said:

*"This provision has been the subject of a decision of the Full Court in **Carlson v Karlovsky** [1988] WAR 59. In that case, it was held that a firearm in a dissembled condition and not capable of discharging a shot, is still a firearm. In the main, that does not help decide this case, although I note that, according to Mr Pavlovich, some of the alterations to make the firearm fireable would be to "drop in" some parts. That was the situation in **Carlson's** case. This case turns on the meaning of the phrase "by any alteration in the construction or fabric thereof". The counsel for the appellant submitted at the trial that the work which had to be done on this disabled firearm was more than an alteration. It was submitted that it amounted to manufacture. Counsel attempted to illustrate this by saying that a pipe could not be regarded as a firearm just because a skilled worker could turn the pipe into a firearm by the work to create all the mechanisms necessary to allow it to fire a bullet. In my opinion, that is not a useful example because, quite clearly, turning a pipe into a firearm would involve the manufacture of a firearm; it would not involve an alteration in the construction or fabric of the pipe. The word "alteration" means the act of altering, and the word "alter" means to make different in some particular, or to modify. Therefore, it becomes clear that it is a matter of fact and degree, and a matter of judgment about whether or not on the particular facts, there has been alteration in the construction or fabric of the object which will make it capable of discharging or propelling a bullet, or whether the changes which have to be made are not mere alteration but, in effect, the manufacture of a firearm. In looking at facts in this case, it is important to bear in mind that this weapon began life as a firearm and alterations were made to it to make it unable to fire. It is not very difficult to accept in those circumstances that changes to make it able to fire bullets again amount to "alteration"."*

In my opinion, the facts in ***Carlson v Karlovsky*** are directly applicable here. Even though there is no analogous definition in the Rules of Racing, the ***Firearms Act*** definition does no more than state the obvious in statutory form. There is nothing in the Rules of Racing or in law to support the contention that the matters referred to in the particulars of ground 3 should be imported into a definition of "capable of affecting performance". No alteration or rectification was necessary to

change the character of these items. There was sufficient evidence before the Stewards for the finding that each item was capable of affecting performance. I would dismiss ground 3.

GROUND 4

Ground 4 of the appeal is in the following terms:

> 4. *The Stewards erred in failing to accept as an element of any charge under rule ARR 175 (hh) –*
>
> (a) *the criminal intent of the person charged, and*
>
> (b) *that liability under the rule was not established without proof that the person charged intended to use any electrical device found in his possession for the prohibited purpose referred to in the rule.*

Counsel for Mr O'Donnell submitted that the rule does not create an absolute offence, or an offence of strict liability in relation to possession. I agree. It is not an absolute offence because liability depends on knowledge, or "intent to possess", dealt with at ground 8. Particular (a) is not validly expressed, because these were not criminal proceedings. If it is the case that Mr O'Donnell complains that the charges should contain some intent element, or a "mens rea" element, then it is knowledge or "intent to possess" which is that intent element.

Particular (b) is not supported by a reading of the rule. The rule creates 2 separate offences, namely possessing and using. There is no prohibited purpose referred to in the rule in relation to possession, which is what Mr O'Donnell was charged with here.

Counsel for Mr O'Donnell, in submissions on this ground, concentrated on the offence relating to the cattle prodder (charge 3). Mr O'Donnell had, at various times at the inquiry, put forward an excuse in relation to this item. Although he admitted possession (both control and knowledge), of the cattle prodder (T56), he said that it was legally purchased for use on his cattle at the farm (T47). Some evidence was given as to his ownership of cattle, and where they had been kept. For present purposes, it can be accepted that the facts may have supported that lawful use of the item, although the Stewards were not entirely accepting of the explanation. They said in their reasons at T144:

> *"The cattle prodder was found in a shed near the stable complex where you train your horses"*

The Stewards did not deal with Mr O'Donnell's explanations in relation to the cattle prodder by way of considering whether he had a separate defence, such as lawful justification or lawful excuse as they might be understood in the criminal law. Whether there should be such a defence to be imported in relation to this rule, or whether the rule should be read down as a matter of construction, were not matters which were separately or distinctly argued at this appeal. I consider that because ground 4 is expressed to relate to each offence, not only the cattle prodder, and because I have found that ground 4 cannot be supported, the conviction in relation to the cattle prodder should not be the subject of separate consideration.

I would dismiss ground 4.

GROUND 5

Ground 5 was abandoned.

GROUNDS 6 and 7

Ground 6 complains that the Stewards reversed the onus of proof. Specifically, ground 6(2) refers to the fact as found by the Stewards that Mr O'Donnell had not detected the items in the house for a period of 15 months (T145). The Stewards used this fact against Mr O'Donnell, by way of

drawing an adverse inference against him on the element of possession, in particular knowledge or "intent to possess". Ground 6(2) should be dealt with as part of ground 7, which complains that inappropriate inferences of guilt were drawn.

GROUND 6(1)

Ground 6(1) is in the following terms:

> 6. *The Stewards erred in effectively reversing the onus of proof applicable in the proceedings.*
>
> ***Particulars***
>
> (1) *The Appellant had on two occasions (pp 79 & 80) indicated that he was approaching the matter by attempting to prove his innocence and was not dissuaded from this error by the Stewards.*

Mr O'Donnell did not have a right to silence. He was required to attend the inquiry, and to give such evidence as directed. This requirement was cast on him by Rule 175(f), which is in the following terms:

> *A.R 175. The Committee of any Club or the Stewards may punish;*
>
> (hh) *Any owner, nominator, lessee, member of a syndicate, trainer, jockey, rider, apprentice, stablehand, bookmaker, bookmaker's clerk, person having official duties in relation to racing, person attendant on or connected with a horse, or any other person who refuses or fails to attend or give such evidence as directed at any inquiry or appeal when requested by the Principal Racing Authority or Stewards to do so.*

The Rule does not differentiate between the two stages of the inquiry, namely before and after a charge is laid. The Rule does not require a licensed person to prove his or her innocence, but it does require the person to answer questions. In this case, the Stewards required Mr O'Donnell to answer questions at both of those stages.

At the outset, the Stewards told Mr O'Donnell that charges might be laid as a result of evidence flowing from the inquiry (T3). Mr O'Donnell wanted an adjournment, to call witnesses (T5). That was denied by the Stewards, because it was the preliminary part of the inquiry. The Stewards told Mr O'Donnell that he would have the opportunity to call witnesses (T5). At T52 to 57, and at T69 to T74 the Stewards asked questions of Mr O'Donnell. This was before he was charged. On two occasions, at T79 and at T80, Mr O'Donnell said that he was trying to and needed to prove his innocence. The Stewards made no comment. Those comments were as part of a response to an invitation from the Stewards (T79) for Mr O'Donnell to "state his case" of why the items were there. In my view, this was simply a case of the Stewards applying Rule 175(f), and asking questions of Mr O'Donnell. In no way could the exchange be said to amount to telling Mr O'Donnell that he bore an onus of proof. As stated above, he did have an "onus" to answer the Stewards' questions. After Mr O'Donnell was charged, the Stewards continued to require him to answer questions (T118 to T125).

In their reasons for decision, the Stewards referred to all of the evidence, including that given by Mr O'Donnell under the requirement that he answer questions. It was on all of that evidence that the Stewards found the charges proved.

I would dismiss ground 6(1).

GROUND 7

Ground 7 is in the following terms:

7. *The Stewards erred in drawing inappropriate inferences of guilt from the facts when such inferences were not reasonably open to them in all the circumstances of the case.*

Particulars

(1) *The Stewards erred in inferring a guilty knowledge of the existence of the electrical devices from the Appellant's statement to the witness Kosanovic that "the Coppers have got me" which statement was at best equivocal and not reasonably capable of bearing the guilty meaning attributed to it by the Stewards.*

(2) *The Stewards erred in drawing a guilty inference from the failure of the Appellant to immediately deny knowledge of the existence of the electric saddle blanket at the time it was found which was not an inference that was fairly open on the evidence.*

(3) *The Stewards erred in drawing an adverse inference from the Appellant's perceived failure to call Kosanovic as a witness, and for failing to secure the attendance of his wife as a witness.*

The Stewards did not believe Mr O'Donnell in his denial of possessing the items found in the house. Further, they did not accept the evidence of Mrs O'Donnell. In their reasons for decision, at T147, the Stewards said:

> *"After due consideration and deliberation, the Stewards find as a fact that you Mr O'Donnell, knew that these electric apparatuses were present in your house and that you had control and possession of them."*

Because of Mr O'Donnell's denials, the Stewards could only have reached that conclusion by way of inference from other proven facts. The fact of knowledge could only be proved by circumstantial evidence. The circumstantial evidence which the Stewards relied on in coming to that conclusion at T144 to T147 was as follows:

1. The black taped hand held electrical device, and the electrical saddle blanket were found in Mr O'Donnell's house, owned by him and his wife;
2. The house was under lock and key;
3. The items had been in the house for a minimum of 15 months before being located by the Stewards;
4. Mr O'Donnell's conduct subsequent to the discovery of the electrical items. In relation to the proposed evidence of the witness Kosanovic, the Stewards found that Mr O'Donnell's conduct amounted to a deliberate diversion of the inquiry process;
5. The witness Kosanovic said that, at the search, when he asked Mr O'Donnell what was happening, Mr O'Donnell said "the coppers have got me";
6. The black hand held electrical device was discovered in the chest of drawers in the bedroom, and the chest of drawers contained both Mr O'Donnell's and his wife's clothes. When it was discovered, Mr O'Donnell's reaction as observed on video was abrasive and flippant; and
7. When the electrical saddle blanket was discovered, Mr O'Donnell's immediate reaction was not to deny, but merely to ask "are you finished?"

The correct way to deal with a circumstantial evidence case has been the subject of many decisions. In ***Shepherd v The Queen*** *(1990) 170 CLR 573*, at 579-580, Dawson J said:

> *"As I have said, the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact – every piece of evidence – relied upon to*

> *prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury might quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof.* ***Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."*** [emphasis added]

In the same case, McHugh J said at 593:

> *"The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance."*

In my view, each of the particular pieces of evidence mentioned in ground 7 was capable of adding to an inference of guilt, although perhaps none of them on their own would be so capable. Mr O'Donnell's evidence that he did not discover the items over the 15 months was not accepted by the Stewards. They found it "difficult to accept". That was simply another way of saying that they believed that Mr O'Donnell did know of their existence. The statement "the coppers have got me" is capable of amounting to an admission. So too is the failure to deny, although both of those items of evidence might not even be admissible if the proceedings against Mr O'Donnell were criminal. The conduct of Mr O'Donnell in relation to the witness Kosanovic was found by the Stewards to be more than simply a failure to call him, and amounted to a deliberate diversion by Mr O'Donnell. That was a significant piece of circumstantial evidence, which bears some further explanation.

Mr O'Donnell's conduct in relation to Kosanovic was used as part of the evidence against him. It was used by the Stewards as more than simply affecting his credibility. This is a permissible use, falling into the category of admission by conduct, sometimes called "consciousness of guilt" evidence. In ***Zoneff v The Queen (2000) 200 CLR 234***, Kirby J at para 63 pointed out that consciousness of guilt evidence should more properly be called post offence conduct. The criteria for admissibility are most often discussed in the cases to do with lies, they being a particular type of post offence conduct. In ***Edwards v The Queen (1993) 178 CLR 193***, at 209, Deane, Dawson and Gaudron JJ said:

> *"When the telling of a lie by an accused amounts to an implied admission, the prosecution may rely upon it as independent evidence to 'convert what would otherwise have been insufficient into sufficient evidence of guilt'..."*

Mr Kosanovic is known by the nickname "Bratso". Mr White, a friend of Mr O'Donnell's, said that Bratso had come to him on 5 August and told him that the things found at Mr O'Donnell's premises were not Mr O'Donnell's, and that he (Mr O'Donnell) knew nothing about them (T110). Mr White telephoned the Chairman of Stewards that day and told the Chairman that the person known as Bratso had come to his place and told him certain things. The Chairman ascertained that Mr White was speaking about the "O'Donnell matter", and suggested to Mr White that Mr O'Donnell should produce Bratso at the inquiry when it commenced (T54 and T108). As to the detail of what Bratso could say about the matter, Mr White said he did not want to know, and thought it best to pass the possible information on to the Stewards (T111 and T114). This all occurred on 5 August, after the search but prior to the first sitting of the inquiry.

At the first sitting of the inquiry, on 11 August, Mr Kosanovic came to the inquiry offices, but remained outside. When he eventually gave evidence at a later date, he said that he could not remember who asked him to come along. He then said that nobody asked him to come along, he just turned up by himself (T76).

The subject of Mr Kosanovic then came up in evidence at the sitting on 22 August, in the evidence of Dianne O'Donnell. She said that the caravan in which she had found the devices had been borrowed for "an old man" to live in (T45). Mr O'Donnell himself said that the caravan had been borrowed for an old guy to live in. He was well known in the industry and had been up north and

had nowhere to live (T53). Thus, the foundation had been laid for the "ownership" of the devices to be ascribed to Mr Kosanovic.

On 22 August, Mr O'Donnell said that he was not able to produce Mr Kosanovic to give evidence. At T53, he said: "I couldn't bring the old guy here". At T55, he said that Mr Kosanovic had said that he would not come, he was too sick. Mr O'Donnell said that he presumed Mr Kosanovic knew something about it (T55). He said that he did not know that they (the items) were there (T56). When the Stewards concluded the proceedings on 22 August, they told Mr O'Donnell that they wished to question Mr Kosanovic. They requested Mr O'Donnell to make every effort to bring him along (T61).

Before the inquiry resumed on 5 September, Mr Kosanovic turned up at the Stewards' offices unannounced. He was interviewed on video, and then gave evidence on 5 September. He said that he knew nothing about it (T76). He had come there to "clear his name", having read in the press that he was said to be in some way implicated.

In my view, the Stewards were entitled to find that Mr O'Donnell's conduct in relation to Mr Kosanovic amounted to a deliberate diversion. The Stewards were aided in reaching that conclusion by Mr O'Donnell's own evidence, that he was unable to produce Mr Kosanovic as a witness when in fact he had been there at the first sitting and later turned up unannounced to be interviewed. Further, the unchallenged evidence of Mr Kosanovic had been that Mr O'Donnell said to Mr Kosanovic at the property immediately after the search "the coppers have got me".

For all of the above reasons, I would dismiss grounds 6(2) and 7.

GROUND 8

Ground 8 of the appeal is in the following terms:

> 8. *The Stewards erred in finding that each of the items the subject of charges 1 and 2 were in the possession of the Appellant there being no evidence that he knew of their existence or whereabouts at any material time.*
>
> ***Particulars***
>
> *(1) The hand held device was located in a drawer of the Appellant's bedroom amongst his wife's personal effects.*
>
> *(2) The saddle blanket was found in a spare room at the house.*
>
> *(3) There was no evidence before the Stewards that the Appellant ever had knowledge of the items being in either of these locations at any time and specifically at the time at which they were located.*

To find possession proved, it was necessary for the Stewards to be satisfied that that Mr O'Donnell had control of the items with the knowledge that they were under his control. See ***Williams v The Queen (1978)*** *140 CLR 591* at 610-612. The requirement that there be knowledge is sometimes expressed as a requirement that there be "an intention to exercise control". In ***Riley and Cosgriff*** (delivered on 18 April 2001, Racing Appeals Reports, Issue 30), His Honour Judge Nixon said at page 3238:

> *"So there are two elements in the concept of possession here, a physical element and a mental element. The physical element is the exercise by the person concerned of dominion or control over the object, while the mental element is the intention of that person to exercise dominion or control over the item. There can, of course, be joint possession of an item."*

Unless a person admits that they have knowledge of something, then it must be proved by inference from other proven facts. In other words, the fact of knowledge must be proved by

circumstantial evidence. In this case, Mr O'Donnell denied knowledge of three of the four items, and as well denied control.

(a) Control

The cattle prodder was found in a plastic storage container in the shed. Mr O'Donnell admitted possession (both control and knowledge), of the cattle prodder (T56).

The blue battery sized device, the black taped hand held electrical device, and the electrical saddle blanket were found in different rooms in the house. In denying that he "lived" at the house, Mr O'Donnell denied control of those items. Further, he expressly denied that he had ever exercised any control over the items (T49).

The evidence on this element of the offence has been summarised above in relation to ground 1.

In their reasons for decision, the Stewards said at T144:

> *"In relation to this the Stewards make the following observations.1. The electric handpiece and the electric saddle blanket were discovered in your house which is owned by yourself and Mrs O'Donnell. The cattle prodder was found in a shed near the stable complex where you train your horses. You and your wife are the only persons living in the house which is under lock and key. You and Mrs O'Donnell have exclusive control of your house. The premises are under your control. You are the most senior person and principle (sic) of the training premises and of the premises."*

The Stewards were entitled to find that Mr O'Donnell exercised control over the house premises. Mr O'Donnell's evidence that he did not live at the house, other than to sleep and shower, asserts a distinction without a difference, as stated above. Mr O'Donnell exercised control over the three items in dispute, because he exercised control over the house in which they were found.

(b) Knowledge or "intention to exercise control"

This was the central issue at the inquiry, at least in relation to the three items being the blue battery sized device, the black taped hand held electrical device, and the electrical saddle blanket. As mentioned above, Mr O'Donnell admitted possession (both control and knowledge) of the cattle prodder. As to the three items in dispute, Mr O'Donnell made no admissions on the video of the search (T33).

Dianne O'Donnell said that she had found the three items in a caravan on the property while cleaning, and had taken them up to the house (T42). She said that it was in May or June of 2001 (T41). She later corrected that to be in the same month, but in 2002 (T126). She said that she found the black taped hand held electrical device and the electrical saddle blanket together, under a bunk in the caravan, and placed them in the second bedroom of the house. She said that she found the blue battery sized device in a wardrobe in the caravan, and placed it in the kitchen cabinet in the house (T42). She said that she did not tell Mr O'Donnell (T44 to T45), and that Mr O'Donnell knew nothing about them (T90).

Mr O'Donnell said that he had never seen the three items, touched them or exercised any control over them (T49). He said that he did not know how the items got into the house (T56), that he had never seen them before, and didn't know that they were there (T120). He said that he was shocked when he was shown the items (T122 and T125). He said that he had never seen the items he was charged with, he had no idea they were there (T137).

The Stewards did not believe Mr O'Donnell, and did not accept the evidence of Dianne O'Donnell. In their reasons for decision, at T147, the Stewards said:

"After due consideration and deliberation, the Stewards find as a fact that you Mr O'Donnell, knew that these electric apparatuses were present in your house and that you had control and possession of them."

The evidence relied on by the Stewards in coming to that conclusion is referred to above, in relation to grounds 6(2) and 7. The Stewards reached their conclusion by way of inference. As I have decided in relation to those grounds, the Stewards were entitled to rely on that evidence in coming to their conclusion that Mr O'Donnell knew of the existence of the items found in the house, namely the black taped hand jack and the electric saddle blanket.

I would dismiss ground 8.

GROUND 9

Ground 9 of the appeal is in the following terms:

9. *The decision of the Stewards to convict the Appellant was contrary to the weight of evidence and not one which was reasonably open to them on the evidence at the inquiry.*

This ground was not seriously pursued at the appeal, and it adds nothing to the previous grounds. I would dismiss ground 9.

GROUND 10

Ground 10 of the appeal is in the following terms:

10. *Steward Mr. John Zucal erred by failing to disqualify himself from hearing the matter in circumstances where he had demonstrated either bias or alternatively made comments that gave rise to a reasonable apprehension of bias at the time of hearing.*

Particulars

(1) Prior to the hearing and at a time when it was then pending, Mr. Zucal was quoted to say "There are allegations that illegal devices are being used on Pilbara racetracks. We expect this to be a major inquiry, with lengthy disqualifications.

In support of this ground, counsel for Mr O'Donnell tendered the relevant newspaper extract. It is apparent that Mr Zucal was not quoted in relation to the case against Mr O'Donnell. He was quoted in relation to allegations generally, and a number of inquiries which might flow from those allegations. Indeed, that is apparent from the very words of the quote which are said to demonstrate bias, or a reasonable apprehension of bias. There is no substance to this ground. I would dismiss ground 10.

CONCLUSION

For all of the above reasons, I would dismiss the appeal.

P. J. Hogan

Seal of the Racing Penalties Appeal Tribunal of WA

PATRICK HOGAN, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION AND REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**GORDON WILLIAM O'DONNELL**
APPLICATION NO:	**A30/08/605**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A E MONISSE (MEMBER)**
DATE OF HEARING:	**30 MARCH 2004**
DATE OF DETERMINATION:	**30 APRIL 2004**

IN THE MATTER OF an appeal by Mr GW O'Donnell against the determinations made by Racing and Wagering Western Australia (RWWA) Stewards of Thoroughbred Racing on 9 October 2003 imposing the following penalties to be served concurrently:

1. **5 years disqualification for breach of ARR 175(hh) – possession of an electrical handpiece**
2. **5 years disqualification for breach of ARR 175(hh) – possession of an electrical saddle blanket**
3. **2 years disqualification for breach of ARR 175(hh)- possession of a cattle prodder**

Mr TF Percy QC with Mr A Rowe, instructed by Laurie Levy, Barristers & Solicitors, appeared for the appellant.

Mr RJ Davies QC appeared for the RWWA Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr P Hogan, Member.

I agree with those reasons and conclusions and have nothing further to add.

Dan Mossenson

Seal of the Racing Penalties Appeal Tribunal of WA

DAN MOSSENSON, CHAIRPERSON

THE RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION AND REASONS FOR DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT:	**GORDON WILLIAM O'DONNELL**
APPLICATION NO:	**A30/08/605**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A E MONISSE (MEMBER)**
DATE OF HEARING:	**30 MARCH 2004**
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Mr TF Percy QC with Mr A Rowe, instructed by Laurie Levy, Barristers & Solicitors, appeared for the appellant.

Mr RJ Davies QC appeared for the RWWA Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr P Hogan, Member.

I agree with those reasons and conclusions and have nothing further to add.

A E Monisse

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

ANDREW MONISSE, MEMBER

APPEAL - 605

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**GORDON WILLIAM O'DONNELL**
APPLICATION NO:	**A30/08/605**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A E MONISSE (MEMBER)**
DATE OF HEARING:	**30 MARCH 2004**
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3. **2 years disqualification for breach of ARR 175(hh)- possession of a cattle prodder**

Mr TF Percy QC with Mr A Rowe, instructed by Laurie Levy, Barristers & Solicitors, appeared for the appellant.

Mr RJ Davies QC appeared for the RWWA Stewards of Thoroughbred Racing.

This is a unanimous decision of the Tribunal.

For the reasons published the appeal is dismissed.

Seal of the Racing Penalties Appeal Tribunal W.A.

DAN MOSSENSON, CHAIRPERSON