APPEAL - 728

DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**SHANE ALLEN EDWARDS**
APPLICATION NO:	**A30/08/728**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR A MONISSE (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING:	**8 FEBRUARY 2011**
DATE OF DETERMINATION:	**16 MAY 2011**

IN THE MATTER OF an appeal by Shane Allen Edwards against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 25 January 2011, imposing a one year disqualification for breach of Rule 175(hh) of the Australian Rules of Thoroughbred Racing.

Mr TF Percy QC, assisted Mr M Tudori of Michael Tudori & Associates appeared for the Appellant

Mr RJ Davies QC, appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

This is a unanimous decision of the Tribunal.

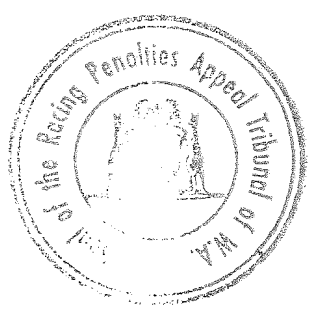
The following orders are made:

1. The appeal be allowed.
2. The decision of the Stewards to disqualify Mr Edwards for a period of 12 months with immediate effect be set aside.
3. Mr Edwards be disqualified for a period of 12 months but with the sentence suspended pursuant to s.17(7) of the Racing Penalties (Appeals) Act for a period of two years from

25 January 2011 on the condition that Mr Edwards does not commit a further breach of Rule 175 (hh).

4. Should a further breach of Rule 175(hh) occur within that two year timeframe then the suspension of the operation of the penalty shall automatically cease and Mr Edwards shall serve out his full one year disqualification thereafter.

DAN MOSSENSON, CHAIRPERSON



APPEAL - 728

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**SHANE ALLEN EDWARDS**
APPLICATION NO:	**A30/08/728**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR A MONISSE (MEMBER)** **MR W CHESNUTT (MEMBER)**
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Mr TF Percy QC, assisted Mr M Tudori of Michael Tudori & Associates, represented Mr SA Edwards.

Mr RJ Davies QC, represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

BACKGROUND

On 7 January 2011 Mr Shane Allen Edwards was called to a Racing & Wagering Western Australia (**RWWA**) Stewards of Thoroughbred Racing inquiry following his convictions in the Midland Police Court in relation to the possession of an unauthorised apparatus and assault on a licensed track rider. The fines imposed for these offences were $500 and $400 respectively. Spent conviction orders were made by the Magistrate. The device in question was an electrical contrivance being an imitation mobile telephone. The convictions received some press publicity.

Mr Edwards is a licensed trainer open class with RWWA of some seven years standing. Over that time Mr Edwards has built up a strong stable with some 70 horses on his books of which 36 are in work. In addition he is in the process of setting up a satellite stable in Geelong.

Mr Edwards was represented by legal counsel at the inquiry. Fairly early in the proceedings it was admitted that there was no issue regarding possession of the prohibited weapon as that fact was admitted.

A qualified licensed electrician was called to the inquiry to speak to the report he had given to the RWWA Principal Investigator. The report stated the device in question was live and rated at 1200kw. It was charged by a cord plugged into its base and looked like a Nokia N5 mobile phone. When activated a blue arc was visible and the apparatus could be clearly heard from a distance. The device could be used to deliver an electric shock either on a human or on an animal. The electrician explained to the Stewards that the device could cause harm equivalent to the police stun guns and tasers. Such devices stun muscles by causing the muscles to move faster and faster to the point where they can seize. The device in question had more power than a cattle prodder.

The RWWA veterinarian Doctor Medd gave evidence to the inquiry to the effect that a device that delivers an electric shock typically causes a painful stimulus to the receiver. Horses being fight or flight animals do generally tend to run away from a painful stimulus. Under the Rules of Racing electrical devices are prohibited because they either induce horses to run faster or condition them to run faster. This makes devices an integrity concern in the competitive context of racing. Further, under the *Animal Welfare Act* it is an offence to use an electric device to deliver an electric shock to an animal except in prescribed circumstances.

Mr Edwards gave evidence that he purchased the device whilst on holiday in Bali during the previous year at a cost of $10. The acquisition was considered to be a good idea at the time. Initially he stated he purchased one unit which was for the protection at home of his young family and wife, Julie Eels. A little later in the inquiry Mr Edwards admitted that he had in fact bought more than the one unit and had given the three other units away. The device he retained was said to be kept in the bottom draw of his wife's underwear cupboard. The device was located in the staff quarters at the farm which are nowhere near where the horses were stabled.

The incident which led to the prosecutions took place approximately three months subsequent to the apparatus having been acquired and after Mr Edwards had received information that one of his employees, John Anderson, was allegedly mistreating one or more of the horses for which Mr Edwards was responsible. As Mr Edwards was concerned there was going to be an

altercation when he confronted Mr Anderson he took the device with him for protection. Whilst confronting Mr Anderson Mr Edwards activated the apparatus which arced but no contact was made. The activation was designed to scare Mr Anderson. This was the only occasion Mr Edwards removed the device.

THE CHARGE

The Stewards decided to lay the following two charges:

> *'First charge is under ARR.175(hh) and I'll read that rule to you:*
>
> *AR.175 The Committee of any Club or the Stewards may penalise; (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, official trial, jump-out or training gallop. For the purpose of this provision where an electric or electronic apparatus has been designed to deliver an electric shock it is deemed to be capable of affecting the performance of a horse in a race, official trial, jump-out or training gallop.*
>
> *Now the particulars of the charge are that you are charged under that rule for having in your possession an electronic apparatus designed to deliver an electric shock.'* (T57 and 58)
>
> *'Stewards do believe you have a charge to answer under ARR.175(q) and that reads:*
>
> *AR.175 The Committee of any Club or the Stewards may penalise; (q) Any person who in their opinion is guilty of any misconduct, improper conduct or unseemly behaviour.*
>
> *The improper conduct being that on 8 November 2010 at your registered training establishment you forcibly took hold, by the neck, track rider John Anderson and pushed him backwards.'* (T57 and 58)

Mr Edwards initially pleaded guilty to both charges. The inquiry resumed on 11 January 2011. At the reconvened hearing Mr Edwards sought the opportunity to change his plea in relation to the first charge. Although Mr Edwards did not dispute he was in possession of the implement he explained that there was no intent to use it on horses and that he did not bring it back from Bali in order to do so. He went on to explain to the Stewards:

> *'an electrical apparatus is a broad spectrum and this wasn't concealed, this wasn't in a whip, this wasn't in boots, this wasn't in a saddle cloth, this wasn't in whatever other ways they have them.'...*
>
> *'The only thing I am guilty of is stupidity. I took a weapon to defend myself against a fella that had been threatening my staff and my horses. There was not attempt to use on horses ever, we all know that in this room right now.'* (T79).

The Stewards allowed Mr Edwards to change his plea. The inquiry was then adjourned to 25 January 2011. Prior to it resuming Mr Edwards' solicitor Mr Tudori had written to the Stewards advising that there was no intention on behalf of the accused to use the device on a horse. The letter went on to state the device was not acquired with a view to it being so used, not designed or adapted to be used on horses, not suitable to be used on horses and never used by Mr Edwards or any associate or employee of his in connection with the training of horses. The Stewards were then asked if they would treat the matter on that basis in which case Mr Edwards

offered to revert to a guilty plea. The Stewards responded in writing to the effect that the four matters raised appeared potentially to be relevant to the question of penalty and should the inquiry proceed to the point where that aspect became relevant for consideration then such submissions as Mr Tudori wished to be put in relation to those points should be made so that they could be properly considered.

Mr Percy QC was granted leave to represent Mr Edwards at the resumption. The Stewards accepted the plea of guilty to the charge. Mr Percy then tendered a considerable volume of material in relation to the question of penalty. The first was a letter from Mr Edwards' wife which explained the circumstances of the purchase of the apparatus as follows:

> *'...Shane and I purchased the alleged tazer in Bali in June 2010. We were staying at the Anontarra Hotel, which is located right on the beach. We were taking a walk together when a man approached us to sell us four tazers, for $50 Australian. I decided that it would be a good idea to get one for myself, as we have had a few houses broken into at the time in the area that we live. I am a stay-at-home mother of two. We felt it would be good protection for myself and my children, if anything were to happen. We kept the tazer in my handbag in my wardrobe, for easy access, in case of an emergency. This device has never been used and was only there for peace of mind for myself. We were unaware that this tazer was an illegal device in Australia. We bought it home through Customs and we were never questioned. I've known Shane for over 10 years and I have never seen him hurt any animal and believe he never would. He is a very kind, caring compassionate person who's not in the nature to harm any living creature.'* (T91 and 92)

Mr Chad Bonney, the foreman at Mr Edwards' stables, wrote to the Stewards stating he had worked with Mr Edwards for some 20 years during which time there was never any suggestion or indication Mr Edwards had used an electrical device on any of his horses. He stated:

> *'...this would be completely against his philosophy and training methods. Shane is a compassionate trainer and an educator of horses and during my time under his supervision, he has never mistreated or conveyed any abuse to any horse in any regards'*. (T93).

Dr Tim Roberts a veterinarian wrote a letter in which he described conducted energy devices and their operation. In the letter he explained they operate to debilitate their target in the range of between 700 kilowatts to 4,500 kilowatts. They would be totally unsuitable for use with animals except possibly in the case of a self defence of an animal attack as they could cause a violent and unpredictable response which could result in injury or death to the operator. They are totally unsuitable for use with livestock. Dr Thomas Brennan, another veterinarian, in addition to writing to Shane Edwards faxed the advice that he believed:

> *'If a horse were hit by a taser gun it would immediately fall to the ground and be temporarily incapacitated with a real chance it may die from cardiac arrest or be seriously damaged by causing cardiac arrhythmia. ...if a taser was to be used on a horse by a track work rider either during exercise. I believe this would cause serious injury or death to both the horse or the jockey and if used by a horse at rest it could cause it to be temporarily paralysed and risk serious injury when attempting to get back on to its feet. 'I've known Shane Edwards for 10 years and whilst it was a serious lack of judgment, that he had a taser gun on his property, I don't believe a trainer of his calibre*

would have any intention of using such a weapon to gain unfair advantage over his rivals'. (T97).

A number of character references were tendered which were helpful to and complimentary of Mr Edwards. Mr L Luciani, trainer, wrote that:

> *'The notion that the electrical device was in any way to be used on his horses goes against my knowledge of the device as well as my understanding of Shane's character.*
>
> *I accept that assault of a staff member is totally unacceptable, however very few trainers who cared about their horses would have reacted any different on hearing the admissions of cruelty from an employee.'*

M Grant of G&G Blookstock Australia Pty Ltd stated:

> *'Shane is widely regarded within the industry as a most professional trainer, whose integrity has never been questioned. He is respected by all sectors of the racing industry Owners, Trainers and Jockeys alike.*
>
> *I am aware of the unfortunate situation Shane has before him with the RWWA Stewards. I honestly do not believe that Shane would not do anything that would harm a horse or would do anything do* (sic) *try and gain an unfair advantage.'* (T102)

Mr A J Brierty of Ascot Farriers stated that he had been a farrier to Mr Edwards' father and subsequently Mr Edwards since 1976 having watched him grow up and seen him every week in all sorts of situations with horses:

> *'... he's shown the highest grade of animal husbandry. Any horse being mistreated by any person, no matter what their credentials, Shane would always be the first to voice his distain. To Shane, the horse always came first. I find it hard to believe that he might have thrown it all away through one moment's stupidity.'* (T101)

Mr Robert Fisher wrote that *'in all this time (since January 2004) we have never seen Shane mistreat a horse. In fact we have never observed him showing any anger or frustration towards one of his charges.'* (T103).

Mr Percy pointed out to the Stewards that in the Magistrates Court prosecution proceedings, Mr Edwards had qualified for a spent conviction. Such an order is only available if the Magistrate considers the offender is unlikely to commit the offence again. (T104). Senior counsel also argued that whilst provocation did not entirely justify or excuse the actions of the accused it significantly mitigated the offence. Mr Edwards had already been the subject of significant punishment, not just as a consequence of his convictions in the Magistrates Court, but also by way of embarrassment and adverse publicity. The successful prosecution had been written up in the West Australian Newspaper.

STEWARDS' REASONS

The Stewards issued one set of reasons which was delivered for both offences. In doing so they went into considerable detail to analyse the facts, comment on the nature of the offence and explain why they had decided the appropriate penalty for the electric device charge was to disqualify. I now quote the reasons in full, even the part relating to the other offence, in order to put everything in context:

'The Stewards have carefully considered all of the circumstances behind the offences you have pleaded guilty to and all relevant matters on the question of penalty. As we must determine a penalty in relation to two distinct charges we make it clear that we have considered each on their individual merits taking into account those matters both common to and unique to each charge accordingly as expressed in this determination. The charges to which you have pleaded guilty to are serious matters. They are matters which do not portray you or the industry in a positive light and which have the potential to undermine the image which the industry strives to maintain. As Stewards we must take positive and decisive action in such matters that threaten the integrity of the sport. Equally we must send a clear message to the industry that offences of this nature are not acceptable or tolerated and that there is no place for them within the industry.

This matter came to the attention of the Stewards following police charges laid against Trainer Mr Shane Edwards in the Midland Police Court on Tuesday, 7 December 2010 in relation to the possession of an unauthorised weapon and common assault. The unauthorised weapon is commonly termed a 'stun gun' and we have referred to it as an electrical apparatus. Through the course of the inquiry we have had the benefit of hearing from parties involved in the assault matter as well as hearing evidence in relation to the electrical contrivance, which included seeing it in operation on video and having an electrical contractor's report. We also had extensive submissions from your counsel Mr D Sheales in relation to the issues which logically arise when a thoroughbred trainer admits or is found to be in possession of a device that is potentially in breach of AR175(hh). Also, Mr Percy your counsel today has made extension submissions. All presented documents, references, etc have been considered by the Stewards.

Commenting firstly on the offence under AR175(q), as reflected within our charge, the factual matrix giving rise to the offence is as was understood was the case in the matter before the courts. We have made no finding that the electrical apparatus was used on Mr Anderson as such finding is not available on the evidence before us.

Had the evidence substantiated the use of the implement, the matter would be viewed far more seriously. Nevertheless it remains a serious offence when a trainer, who is in the position of employer, assaults a person in their employ in the manner admitted by you.

This was a young person for which you were responsible for as an employer and such conduct is reprehensible. This was a premeditated course of action whereby you armed yourself with the electrical device and illegal weapon, according to you drove some distance to where Mr Anderson was located unannounced, brandishing the device and on your admission threatened him with the device and then engaged in a physical altercation with him of the kind outlined within the charge. We fully understand the reasons behind your actions, however that does not excuse your conduct. You could have reported Mr Anderson to the Stewards on becoming aware of his mistreatment of your horses. You could have dismissed him immediately from your employ and then report the matter to the Stewards. Confronting and assaulting him was the least proper course of action a responsible and professional person such as your self could have undertaken. As racing experts we well understand your anger towards a person who has mistreated animals in your care. We recognize that this was not a completely

unprovoked incident or one where you attacked Mr Anderson for no reason at all. Taking all these matters into account, including those which follow which relate to your personal antecedents we believe the appropriate penalty to be a fine of $2,000.

The Stewards see the offence under AR175(hh) as the far more serious of the two. It represents an offence of one of the most serious rules found in the rule book, which is reflected by the list of previous offences which have attracted long periods of disqualification. Past precedent whilst relevant and of guidance, is not the sole matter of consideration in such matters and that the circumstances of each offence of the rule must be fully weighed and taken into account to arrive at the appropriate penalty. Nevertheless we have reviewed the available past cases involving breaches of AR175(hh) and are familiar with the basic elements of the following cases: Mr C Bellette (Stablehand) 23 May 2007 10 yrs disqualification. Being in possession of electrical apparatuses (jiggers) Mr C Fox (Jockey) 7 September 1992 5 yrs disqualification. Being in possession of electrical apparatus Mr W Fox (Jockey) 3 August 1991 10 yrs disqualification carrying and using an electrical apparatus in a race Mr B Johnson (owner) 2 August 1991 5 yrs disqualification Being in possession of electrical apparatus Mr G O'Donnell (Trainer) 9 October 2003 3 charges of being in possession of electrical apparatuses – jigger's, electrified saddle and cattle prodder (sic). The cattle prodder offence incurred a 2 year disqualification whilst the other two charges incurred 5 year disqualification. Mr A Yugovich (Jockey) 4 August 2003 15 years for using and being in possession of a variety of electrical apparatuses and that was jiggers whips, with electrical apparatuses. Always important in consideration in any matters is the offenders personal circumstances. In your case you are a young, up and coming, highly successful trainer having just won the Perth Cup. Ignoring for the moment these offences before us, you are exactly the sort of person the industry would seek to attract. You are professional, competent and have an exemplary record. You have invested heavily in the sport and clearly would have a long and most likely prosperous future within it. You have a large number of horses in your care, staff and no doubt supportive owners who rely on you. You are a person well known within the industry both through your family and your own achievements and have always had a good reputation within the sport. We recognize that you have invested heavily within the sport and are in the process of expanding your involvement in it with your recent acquisition of a training establishment in Victoria. You have no history of any involvement in anything of this nature and your regret is evident to us. You have also acknowledged your culpability in these matters through your plea's of guilt. These are all factors that weigh heavily in your favour which we are acutely aware of in relation to both charges which we take into account accordingly in our assessment of penalty. The manner in which you came to be in possession of the offending item is also a relevant consideration. This was not a device that you constructed or of a kind that came into your possession in dubious circumstances. Neither is it of a design commonly known within the industry as a jack, jigger or other similar electrified device to which many past matters relate to. Nevertheless it remains as we have seen on the video, a device capable of administering an electric shock to a horse and thus the possession of it must be an offence of the rules. The possession of such a device is illegal in the community in general. It should not have been in your possession, let alone around a stable of

thoroughbred horses. It is also disguised, in as much as it looks like an ordinary mobile phone. It has two prongs and the ability to produce an audible and visual arc of electricity. As a thoroughbred race horse trainer we are astounded that you would take possession of such a device in the first place, show it to other people and in this case come armed to a situation that was always likely to result in conflict with such an item. Possession type offences such as this is are not unique or unusual. They are aimed at preventing a person from being in a position where they may potentially commit an even greater offence. In the racing context of this particular rule, they seek to completely remove any potential for the image of the industry to be tainted by trainers being in possession of such items that are banned by the rule. The expected reaction from a responsible trainer to any form of electrical device capable of delivering a shock would be to completely distance themselves from such item. Electrical apparatus capable of delivering a shock are abhorred in the industry and represent one of the most serious affronts to the rules. It amazes us after having seen it in operation that you would not immediately dispose of it. Whilst it is not a 'jack' as would usually be imagined by the industry, its capabilities and similar methods of operation in this regard are self-evident and should immediately have given you cause to consider the appropriateness of you having such an item. Not only did you not dispose of it, you had 3 others which you passed around to friends. As we have heard and seen in evidence, this is a device that by definition and operation is capable of delivering a shock to a horse. It is thus deemed to be capable of affecting the performance of a horse in a race, official trial, jump-out or training gallop. To use such a device on the horse would constitute a different and far more serious offence. The rule to which you have pleaded guilty contemplates only the fact of your possession and the intrinsic capabilities and functions of this device. It is not necessary for us determine your intentions with regard to the use of this device in order for an offence to be made out. We are aware and factor accordingly that there is no evidence that you had used or attempted to use this device on a horse. The circumstances of your possession according to you were that this item was one of four purchased by you. The remainder of which were given away. It was not carried by you or your wife for personal protection or kept in ready reach in the event you needed to defend yourself but was stored in your wife's underwear draw for months. In such location, it is difficult to be certain what purpose this item served for you if any. This is an illegal device for any person to have albeit that this fact is not a matter which is in our jurisdiction or one for us to add as aggravation to penalty. What is also known on your own evidence is that the sole occasion it left the draw was when you took it to confront Mr Anderson. This was not a true self-defence matter but rather one where you armed yourself with this item in the process of confronting Mr Anderson. The only occasion it was produced was not to ward off an assailant. Therefore we must treat your possession of this item as a possession offence as articulated by the rule you have pleaded guilty to. In doing so we make it clear that in arriving at the appropriate penalty we are fully aware of the matters discussed and have approached the exercise of determining a suitable penalty on that basis. Even accepting as we do your reasons for acquiring the item, whilst it removes any aggravation in relation to your possession, it does not totally obviate the seriousness of this offence to an extent beyond which we have afforded the appropriate mitigation in our determination of penalty in the matter.

Having considered past offences of this rule and comparing those circumstances to this case, it is clear to us that your offence is at the lesser end of the scale. Also in your favour are your personal circumstances and pleas of guilty as described. After carefully weighing all these relevant matters and circumstances we cannot be satisfied that this offence can be dispensed with by way of suspension or fine. Trainer's in possession of items of an electrical kind as contemplated by the rule, which are deemed to be capable of effecting the performance of a horse, represent a most serious set of circumstances. They cannot seek to avoid the implications of such possession on the basis that the item, which is capable of delivering an electrical shock, was not intended by its maker for use in such way. Neither is it of assistance to them on a charge of possession that it was not used or intended to be used in such way. Put simply possession is prohibited by the rule and it is that which must be penalised accordingly after taking into account all relevant matters. Precedent indicates to us that disqualification has always resulted when trainers are found in possession of such items. We do not find in this case that circumstances would warrant a different mode of penalty. Clearly significant mitigation must be afforded to you for the personal circumstances as they pertain to you. Mitigation is also afforded for the circumstances of your possession and the matter as discussed. Even after allowing for these factors in your favour, the stewards believe disqualification to be the appropriate form of penalty. It is left to us to determine the appropriate period of disqualification. Disqualification can be permanent or for a set period of item under the Rules of Racing. Past precedent indicates a range of penalty of 2-10 years for possession offences. We believe your case to be at the bottom end of the scale and worthy of further mitigation. After carefully weighing all of the relevant matters we believe the appropriate penalty to be a disqualification of 12 months, effectively immediately.' (T117-124)

THE APPEAL

The grounds of appeal were simply:

> '*The Stewards erred in imposing a period of disqualification after having made a specific finding that the possession of the electrical device was unrelated to the Appellant's position as a horse trainer and that the device was not intended for use in relation to horses*'.

At the same time as Mr Edwards appealed he sought a suspension of operation of the penalty. After having received the exchange of written submissions in the usual way from both sides I granted the stay until the appeal was heard.

At the conclusion of the appeal hearing the Tribunal reserved its decision. Senior counsel for Mr Edwards then applied to extend the suspension of the operation of the penalty. I granted the application and extended the suspension until the reserved decision was handed down.

THE APPELLANT'S ARGUMENT

Mr Percy's argument in the appeal was presented along the same lines as his submissions at the inquiry. In summary he asserted, inter alia:

- there was no sinister purpose, rather it was a response or reaction to information he had received regarding mistreatment of horses;
- the device was not taken to the stables;
- the use of the device was unequivocally benign in the context of racing, indeed its use was unrelated to horse racing;
- forfeiting a trainer's livelihood for 12 months results in very serious consequences including loss of clients in perpetuity;
- the range of penalties imposed in the matters the Stewards referred to was never appropriate;
- the Rule in question is very wide;
- strong character evidence was presented in favour of Mr Edwards.
- it was only a technical offence;
- there is a separate specific offence of bringing the industry into disrepute, which was not the basis of the charge.

THE RESPONDENTS' ARGUMENT

Mr Davies QC argued amongst other things:

- the Rule only requires proof of possession rather than possession with intent;
- the Rule is far more subtle than to speak of it in criminal terms;
- the reasoning of Anderson and Owen JJ in *Harper v Racing Penalties Appeal Tribunal of Western Australia and Another* (1995) 12 WAR 337 applies to the case where they stated in their joint judgment:

  > *'Hence, the very survival of the industry as well as substantial government revenue would seem to depend on encouraging the public to bet on horse racing, that is, to bet on the outcome of each race.*
  >
  > *'If it is correct to think that the financial well-being of the industry depends significantly on the maintenance of betting turnover, the need to maintain integrity in horse racing, and to do so manifestly, is easily seen to be imperative and of paramount importance. It may well be anticipated that unless racing is perceived to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect to the administration of drugs to horses and the enforcement of those controls by peremptory means.*'; (T347)

- proper control of the sport is essential;

- the image of a licensed person obtaining and retaining such an implement cannot be tolerated;
- this was like the *O'Donnell* case where the cattle prodder sat in the shed and was not used;
- the image of the industry, which is all important, has been tainted by the publicity;
- the apparatus was deemed to be capable of affecting the performance of a horse;

REASONS

As previously quoted Rule 175(hh) makes it an offence for anyone not only to use but also simply to possess *'... any electric or electronic apparatus or any improper contrivance capable of affecting the performance of a horse in a race, official trial, jump out or training gallop ...'*. The Rule, which was amended in September 2009, now also goes on to state any such apparatus which is designed to deliver an electric shock is deemed to have that capacity. The implement which Mr Edwards took with him when he confronted Mr Anderson clearly met the description of such an outlawed device. It is worth noting the Rule does not distinguish between actual use of the apparatus on a horse as distinct from simply owning a device with that capability. Either situation constitutes a breach. Obviously however, passive ownership (particularly of a device not designed to enhance the performance of a horse) should not incur as severe a penalty as actual use of such a contrivance on a horse. The breach in question involved somewhat more than mere passive possession as Mr Edwards had armed himself with the outlawed implement when confronting an employee who was involved with Mr Edwards' horses.

Despite changing his mind on more than one occasion during the course of the Stewards' inquiry Mr Edwards eventually admitted to the Stewards that he did own such an outlawed device. Consequently and appropriately the Stewards eventually ended up treating the matter as a plea of guilty which meant the Stewards were only required to decide on the penalty to be applied. The appeal therefore is against the penalty only.

There can be no doubt that for any trainer merely to own such an implement constitutes a serious breach of the Rules. This occurs irrespective of the motives in acquiring the device in the first place, the reason for retaining it thereafter and the circumstances of where and how it was kept. It is totally abhorrent to the racing industry for a licensed trainer to possess such an implement. Whatever the motives or wherever the place of storage of the implement happen to be are irrelevant to the commission of the offence. The fact that in this case the implement was kept away from licensed premises, was embedded in the wife's personal objects in the cupboard at home and was not used on a horse, does not alter the fact that a serious breach had been committed.

Clearly a breach of this magnitude by a person entrusted with the heavy responsibility associated with training racehorses is a grave misdeed which tarnishes the reputation of not only this prominent trainer but also the industry generally. Consequently there can be no question such a breach called for very strong action by the Stewards. It was necessary both to

punish the offender and to send the appropriate message to the community that such behaviour was intolerable.

In their comprehensive reasons as to how they arrived at the 12 month disqualification the Stewards quite appropriately:

- recognised the incident was not completely unprovoked;
- were aware it was not a true case of use for self defence purposes;
- considered the penalties imposed for past offences;
- took into account Mr Edwards' personal circumstances including his exemplary record;
- acknowledged Mr Edwards had invested heavily in the sport and was running a large operation;
- mentioned this incident was out of character ;
- noted the incident was regretted;
- stated Mr Edwards had acknowledged his culpability;
- referred to the somewhat innocuous reasons for and non-racing industry circumstances of acquisition;
- pointed out the fact the device was not of a design similar to those involved in past offences, namely it was not a '*jack*', but that it was disguised as a mobile phone;
- conceded the offence was at the lesser end of seriousness compared to past offences;
- appreciated the incongruity of a professional trainer having such a device, as by definition it could deliver a shock to a horse which means it could affect performance;
- were aware for the offence of possession to be proven that proof of intention was unnecessary;
- recorded there was no evidence that the device was used or attempted to be used on a horse;
- concluded that neither a fine nor a suspension were appropriate; and
- were alive to the fact that significant mitigation should be afforded.

In my opinion unless there are very special or particularly unusual circumstances there is no doubt that disqualification must be the appropriate penalty to be imposed on a trainer for possessing an electrical apparatus. All of the surrounding circumstances to the perpetration of an offence of this nature need to be considered in evaluating the seriousness of the breach and the length of the penalty that should consequently follow. When one evaluates the surrounding facts and circumstances of this matter fully it is apparent that there is a considerable amount of evidence addressing a range of relevant factors which are favourable to the appellant's position.

After the Stewards' reasons were read out at the inquiry Mr Percy for Mr Edwards posed the following question:

> *'The first thing I want to ask, is, I'm not sure whether I heard it correctly, but you did find that the possession was not intended to be in relation to use on horses, that is a finding that was made?'* (T124)

The Chairman replied: *'Essentially, yes.'* (T124)

I am satisfied that it is clearly established by the evidence before the Stewards that Mr Edwards is a fierce opponent to cruelty to horses and that he is a trainer of integrity. There was no doubt Mr Edwards was reacting emotionally when he learned of the alleged mistreatment by one of his employees. That reaction obviously cannot exonerate Mr Edwards from the offence of possessing the apparatus. Nor can the fact that at no stage was the device acquired, housed or taken away from its usual hiding place with the intention of employing it in a way that was directly involved in a racing situation vis-à-vis a horse absolve. Had it not been the case that the device:

- was bought in Bali for self protection by a person who abhors cruelty to horses,
- was hidden away at home,
- only emerged to be employed by the owner for personal safety reasons and
- was never intended to be used for a sinister purpose on a horse

then a longer penalty than a one year disqualification would have been appropriate. The various cases quoted in the Stewards' reasons reflect that.

Mr Edwards is held in very high regard by his peers in the industry. The positive character references which were produced before the Stewards are of considerable influence in bolstering confidence that Mr Edwards is not likely to acquire another electric apparatus or improper contrivance that can affect performance and as a consequence offend again. This is reinforced by the fact that the Magistrate in the Police Court proceedings came to the same conclusion in issuing the spent conviction order.

The consequences of serving a 12 month disqualification would be to cause extreme hardship to Mr Edwards' business operation. The impact of the disqualification on Mr Edwards' capacity to earn a livelihood would be disastrous. The impact would be likely to be felt long after the period of disqualification came to an end. It would make it very difficult for him to recover commercially and reinstate or rehabilitate his operation into the future. Mr Edwards has already suffered a stain to his record and has also incurred a fine. He has endured the embarrassment of the public reporting of the Magistrate's proceedings in The West Australian newspaper.

The various matters referred to above which are favourable to Mr Edwards' position in relation to the penalty in my opinion do tangibly reduce the scale of seriousness of the offence. Consequently, I like the Stewards, consider those factors combined should positively affect the outcome by diminishing the length of time for the disqualification which would otherwise be appropriate.

Clearly the device was not acquired for the purpose or with the intention of being used in relation to racing. It was sold to Mr Edwards whilst he was overseas and presumably by someone unconnected to the racing scene in this State. The purpose of its acquisition and potential role were totally divorced from Mr Edwards' professional involvement in the racing

industry. The evidence overwhelmingly established Mr Edwards has a very deep seated and well developed positive attitude towards the proper treatment of animals. Nothing suggests any sinister purpose behind the acquisition. It is appropriate to conclude Mr Edwards would never have used the device on a horse and would not in any way have contemplated the employment of the device to gain some advantage in a racing context.

Once all of the mitigating factors are fully appreciated, how then do they affect the need to punish this offender and at the same time address the damage to the industry, taking into account the considerations raised in the *Harper* case?

I am satisfied the Stewards did not give sufficient weight to all these various mitigatory factors when they are evaluated in combination. I am satisfied the Stewards did fall into error in imposing a 12 month disqualification but only to the extent that it was to take effect immediately.

I would be satisfied that Mr Edwards should be given the benefit of the opportunity to prove that he will not re-offend in a like manner. I would also be satisfied, provided Mr Edwards does not so offend again for a prolonged period, that the operation of the disqualification should continue to be suspended. But having made that statement, I do need to make it entirely clear it is only on rare occasions I would contemplate suspending the operation of a disqualification. The particular circumstances of this case in my opinion would justify taking that unusual action.

I therefore would uphold the appeal, impose the same penalty as imposed by the Stewards, but suspend its operation on the condition that Mr Edwards does not re-offend in a like manner for a period of 24 months from the date of the Stewards' determination.

CONCLUSION

In the light of these reasons and in order to clarify how I would deal with the matter, I set out the orders I would make as follows:

1. The appeal be allowed.
2. The decision of the Stewards to disqualify Mr Edwards for a period of 12 months with immediate effect be set aside.
3. Mr Edwards be disqualified for a period of 12 months but with the sentence suspended pursuant to s.17(7) of the Racing Penalties (Appeals) Act for a period of two years from 25 January 2011 on the condition that Mr Edwards does not commit a further breach of Rule 175 (hh).
4. Should a further breach of Rule 175(hh) occur within that two year timeframe then the suspension of the operation of the penalty shall automatically cease and Mr Edwards shall serve out his full one year disqualification thereafter.

Seal of the Racing Penalties Appeal Tribunal of WA

DAN MOSSENSON, CHAIRPERSON

APPEAL - 728

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR W CHESNUTT (MEMBER)

APPELLANT:	**SHANE ALLEN EDWARDS**
APPLICATION NO:	**A30/08/728**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR A MONISSE (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING:	**8 FEBRUARY 2011**
DATE OF DETERMINATION:	**16 MAY 2011**

IN THE MATTER OF an appeal by Shane Allen Edwards against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 25 January 2011, imposing a one year disqualification for breach of Rule 175(hh) of the Australian Rules of Thoroughbred Racing.

Mr TF Percy QC, assisted Mr M Tudori of Michael Tudori & Associates appeared for the Appellant

Mr RJ Davies QC, appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

I have read the draft reasons of the Chairman and I agree with his reasons and with his decision. I desire only to add a few words of my own to those reasons.

Although I have no doubt whatsoever that this tribunal has the power in an appropriate case to suspend a penalty from taking immediate effect, the circumstances when it will in fact be appropriate for us to do so will be rare. It will require an extraordinary set of facts before we will consider relieving a licensed person of the immediate consequences of a penalty imposed for a breach of the rules.

In particular, I do not think that any analogy can be made with the power to suspend a sentence that exists within the criminal law. Although analogies with the criminal law are often made by counsel in the course of argument before this tribunal, there are limits to how helpful such analogies can be.

What puts this case, to my mind, into a class of its own is the combination of the following matters:

Firstly, the offence might be described as being, in a sense, a technical breach of the rules. The electrical device in question was not designed to be used on an animal and there was evidence before us that it would in fact be quite unsuitable for such use. It was not purchased or intended for such use. It was stored away from the horses; and was never taken anywhere near them. There is some suggestion that it was in fact purchased for the safety or security of the appellant's wife.

However, although this breach of rule 175 (hh) Might be considered as a technical one, it was nonetheless a very real one. It may not be true that possession of an electrical device by a trainer will inevitably produce a period of disqualification but it certainly will in most cases, and it would be an unusual case where anything less than 12 months disqualification would be appropriate.

Secondly, the appellant has no record of any prior breaches of the rules and his character references indicated that he abhorred cruelty to animals in any form. While one always views character references put forward on behalf of a miscreant with a cynical eye, I am persuaded by these ones.

Thirdly, a period of disqualification falls more heavily on a trainer than on other classes of licensed persons. A trainer will usually have invested substantial capital into building up a stock of goodwill which will be permanently lost by disqualification for any length of time. In some sense, this hardship is simply a part of the penalty of disqualification. But it would fall especially hard on the appellant in this case; and I do not think that his breach requires this degree of severity for its punishment.

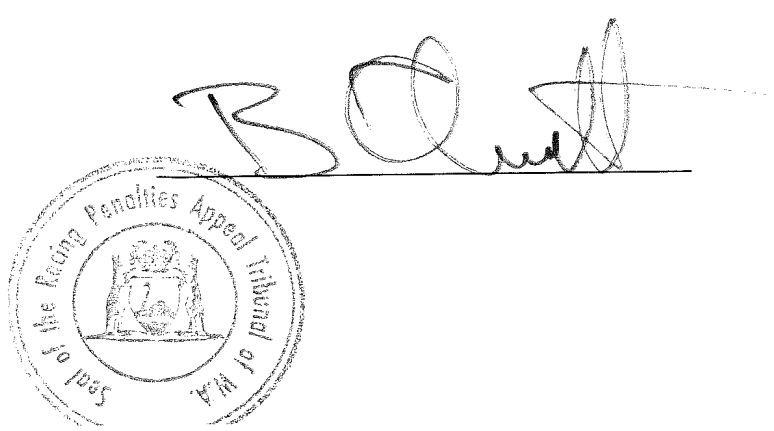
However, substituting a fine or some penalty other than disqualification detracts attention away from the seriousness of an offence of this nature. There is a need for general deterrence when it comes to breaches of the rules involving electrical devices, and I would be very reluctant to impose any penalty, which might be seen as a precedent in future cases, which suggested that we do not view such conduct very seriously indeed.

Disqualification will be the normal penalty for it.

But I am satisfied that to make the appellant serve out his disqualification immediately would work an injustice in this case.

I agree with the Chairman that in the particularly unusual circumstances of this case we should relieve the appellant of that injustice.

A suspended penalty is not, however, no penalty at all. It will continue to hover over his head for the next two years; and he can look forward to very little sympathy from us if he does anything to trigger its operation over that period.



WILLIAM CHESNUTT, MEMBER

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A MONISSE (MEMBER)

APPELLANT:	**SHANE ALLEN EDWARDS**
APPLICATION NO:	**A30/08/728**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR A MONISSE (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING:	**8 FEBRUARY 2011**
DATE OF DETERMINATION:	**16 MAY 2011**

IN THE MATTER OF an appeal by Shane Allen Edwards against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 25 January 2011, imposing a one year disqualification for breach of Rule 175(hh) of the Australian Rules of Thoroughbred Racing.

Mr TF Percy QC, assisted Mr M Tudori of Michael Tudori & Associates appeared for the Appellant

Mr RJ Davies QC, appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr D Mossenson, Chairperson.

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

A G Monisse

ANDREW MONISSE, MEMBER

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