

RACING APPEALS TRIBUNAL

RAT 11/10

DATE: MONDAY, 20 SEPTEMBER 2010

TRIBUNAL: PRESIDENT: MR C R LEE

ASSESSOR: MR G PRETTY

MR J PETZER, for CHAIRMAN OF STEWARDS,
THOROUGHBRED RACING SA LTD

MR S WARD appears for Thoroughbred Racing SA Ltd
Stewards

APPELLANT: MR S PATEMAN

MR M BELL appears for the Appellant

IN THE MATTER of an Appeal by **STEVEN PATEMAN** against a decision of Thoroughbred Racing SA Ltd Stewards.

BREACH OF RULE: ARR 81A and ARR 81B

Rule 81A (1): Any rider commits an offence and may be penalised if –

- (a) A sample taken from him is found upon analysis to contain a substance banned by AR.81B

Rule 81B: The following substances and/or their metabolites, artifacts and isomers are declared as banned substances in riders when present in a urine sample (unless otherwise stated) at a concentration above the applicable cut-off level:

Alcohol (at a concentration in excess of 0.02% on a breath analyser)

PENALTY: SUSPENSION OF LICENCE FOR 30 DAYS AND A FINE
OF \$1000.00)

DETERMINATION

On Monday 14 June 2010, the Appellant, a licensed jumps jockey, was subjected by the Stewards to random breath tests at a meeting at the Murray Bridge Racecourse. On the preceding Thursday, the Appellant had been declared as the rider of Tradesman's Choice in Race 3 at 12.35 p.m. The results of the tests were positive and the Stewards stood him down and commenced an Inquiry. The Inquiry was resumed on 9 July 2010 and 23 August 2010. On the second of those days, the Appellant was charged with a breach of rule 81A of the Australian Rules of Racing.

The charge was in the following terms:

"You, Steven Pateman, a jockey licensed by Thoroughbred Racing South Australia Limited for the period ending 31 July 2010 prior to Race 3 at Murray Bridge on Monday, 14 June 2010, when declared as the rider of TRADESMAN'S CHOICE, did present to ride and upon the request of the Racecourse Investigator did provide a breath sample which contained a substance banned by Ar.81Bm, being alcohol at a concentration in excess of .02% on a breathanalyser."

The appellant pleaded not guilty and after further deliberation the Stewards found the charge proved. They suspended his licence for 30 days and fined him \$1,000. His appeal is against both the conviction and the severity of the penalty.

As advanced by his counsel, Mr Bell, the Appellant's main ground of appeal is based upon a zero reading which resulted from a prior test conducted by a police officer at the Murray Bridge Police Station. But before I deal with the grounds of appeal, I need to explain in more detail the events of 14 June 2010.

1. Having travelled by car from Werribee and then aeroplane from Melbourne earlier that day, the Appellant arrived at the Murray Bridge Racecourse at about 10.30 a.m. and started walking the track.
2. About 15 minutes later, and acting on advice received after telephoning Mr O'Keeffe, General Manager of the Australian Jockeys Association, the Appellant was driven to the Murray Bridge Police Station by Martin Kelly. Kelly's evidence to the Stewards was: "...he told me like that he'd probably be over the limit and he wanted to see before he goes out there..." The appellant was breath tested at the Police Station at 11.00 a.m. The reading was zero.
3. The Appellant was driven back to the racecourse where he was breath tested on three separate occasions by Mr Glover, an investigator employed by Thoroughbred Racing SA Ltd, with the following results:

11.19 a.m. .063
 11.28 a.m. .072
 12.24 a.m. .055

Mr Glover told the Stewards that, after the first test, he asked the Appellant what time he finished drinking, and the Appellant told him 10 o'clock, he was drinking stubbies, and "he's not sure how many he had last night".

- 4 Nine jockeys and one Steward were tested by the same machine between 10.30 am and 11.44 am. The result in each case was zero.
- 5 The Appellant told the Stewards he had been drinking the previous evening, having accompanied his girlfriend to a function after an equestrian event at Werribee.

When the Inquiry resumed on 9 July 2010, the Appellant told the Stewards that at the function at Werribee he consumed six Pure Blonde beers, but did not finish the last one, between 5.00 p.m. and 10.30 p.m. He said he drank no other alcohol between 10.30 p.m. and when the tests were conducted on the following day. He produced statutory declarations from his girlfriend and other witnesses to support his account.

During the hearings on 9 July and 23 August, the Stewards called Mr Anthony Hehir, whose business includes the supply and calibration of drug and alcohol testing kits, Dr Elizabeth Clisby, Sports Physician, and Professor Mark White, Professor of Pharmacology at the University of S.A.

From the evidence of those witnesses, the following propositions emerge:

1. The machine used by the Stewards, a Lion SD400, was calibrated on 7 June 2010 (a week before the meeting) and checked and confirmed as accurate on 15 June 2010 (the day after the meeting).
2. The discrepancy of .009 between the readings taken from the Appellant at 11.19 a.m. and 11.28 a.m. is within acceptable testing error.
3. Elimination rates in the population fall between .01 and .02 per hour. Ingestion of food will slow the rate of absorption but not the rate of elimination.
4. The reductions in readings from 11.19 a.m. (.063) and from 11.28 a.m. (.072) to 12.25 p.m. (.055) are both consistent with acceptable testing error and normal rates of elimination.
5. The mix of positive readings from the Appellant and zero readings from the other persons is typical of a machine working correctly.
6. The zero reading at the police station is irreconcilable with the positive readings at the racecourse.

7. It is possible that a false zero reading could result from the failure of an operator who lacks training to operate the machine correctly.
8. The evidence of the Appellant and his witnesses concerning the alcohol that he consumed at Werribee is irreconcilable with the test results obtained from him at the Murray Bridge Racecourse the following day.
9. Using the elimination rate to count back from a reading of .063 at 11.19 am on 14 June, and assuming a consumption to but not beyond 10.30 pm the previous day, the Appellant's consumption would have been in the order of 12 to 13 bottles of beer producing a blood alcohol level of over 0.2.

Although I take into account the conclusions that the Stewards reached in this case, the Constitution of the Tribunal obliges me to conduct a rehearing, which means that I must apply my own judgment to the evidence, albeit with advice from my colleague. Moreover, before the Appellant can be found in breach of the rule, I must be satisfied of his guilt on the balance of probabilities, but giving due weight to the seriousness of the charge and the financial and other consequences of the penalty.

The evidence which I have outlined leads me to conclude that the testing of the Appellant at the racecourse was accurate within acceptable parameters and that the Appellant's blood alcohol level at the time of the tests was in excess of .02 in terms of rule 81B.

Those conclusions bring me to Mr Bell's submission that, irrespective of whether the reading at the police station was false, the Appellant entertained a reasonable belief in the accuracy of the reading, and so he has a defence to the charge. Mr Bell submits that rule 81A of the Australian Rules of Racing imposes a strict rather than an absolute liability, and that, whilst guilty knowledge or intention is not an ingredient of the offence, the Appellant is entitled to an acquittal if he had 'reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment'. The words in quotes are taken from the principal authority relied upon by Mr Bell, namely *Proudman v Dayman* (1941) 67 CLR 536 per Dixon J. (as he then was) at 541.

Proudman v Dayman, and other examples of the application of the *Proudman v Dayman* principle mentioned by Mr Bell, are all concerned with the strict liability imposed by statute or by regulation made under a statute. The Australian Rules of Racing, at least to the extent that they apply in South Australia, do not have the force of a statute or regulation. TRSA, as a body corporate governed by a constitution, has adopted the Australian Rules for operation in South Australia. The provisions of the Rules which govern the conduct of licensed persons, such as the Appellant, derive their force from the agreement of those persons to be bound by the Rules as a condition of the grant of their licence. So the powers of

the Stewards in disciplinary matters derive not by force of statute or regulation, but by force of contract.

In the result, I am of the opinion that the principle of *Proudman v Dayman* is not available to a licensed person in breach of the Rules.

I do not think that the requirement of Rule 81A of absolute responsibility and the absence of any right of recourse to the *Proudman v Dayman* principle should be regarded as leading to an arbitrary or unjust result. It is reasonable to infer from the words and context of rule 81A that the rule is designed to protect as far as possible the welfare and safety of jockeys and horses, and the integrity of the industry. Issues of state of mind and belief should bear upon penalty, but not upon whether a rider is in breach.

A further point about the irrelevance of the *Proudman v Dayman* principle to breaches of Rule 81A can be illustrated by reference to the facts of that case. *Proudman* was charged on complaint under the Road Traffic Act with having permitted an unlicensed person to drive her car. Her defence was that she believed the driver held a licence and she had reasonable grounds for her belief. In the end, the High Court held that the statute imposed strict liability and the defence was open, but that the defence had not been made out in her case.

The primary ingredient of *Proudman's* offence was the mere fact of the grant of her permission. The primary ingredient of the Appellant's offence is the mere fact of the positive test. It does not relate to any decision by him on that day to ride *Tradesman's Choice* at the meeting. The Appellant had accepted an engagement to ride on or before the previous Thursday, and, from the time he was declared as the rider of the horse on that day, he was under an obligation to ride.

Proudman could have withheld her permission if she had known that the driver was unlicensed, and there would have been no charge and no other consequence. If the Appellant had declined to fulfil his obligation to ride in the knowledge that he was or may have been over the limit, there may still have been a charge and there would have been a consequence for him in any event.

In short, a withholding by *Proudman* of her permission would have avoided any breach of the Road Traffic Act. A renouncing by the Appellant of his obligation to ride, on the other hand, would not have avoided, if he had been tested, a breach of the rule.

I turn to the appeal against the severity of the penalty.

In the recent matters of Hamblin and Kerford, the penalties were both upheld by me on appeal. Hamblin, a jumps rider, was suspended for 26 days and fined \$500. I said I thought the penalty was lenient. Kerford was suspended for 9 weeks. I said the penalty was severe, but I supported the Stewards' point that rider education in recent years in this State with respect to the impact of alcohol should now lead to higher deterrent penalties than have been the case in the past.

In the Appellant's case, in detailed and extensive reasons, the Stewards said they took into account a number of considerations, including the fact that this is the Appellant's first rule 81A offence in nine years of riding and that he rides mainly in Victoria and may not have been aware of TRSA's zero tolerance policy in this State.

In my opinion, the zero test at the Murray Bridge Police Station should entitle the Appellant to some credit, but offsetting that should be the Appellant's plainly false representation to the Stewards regarding the amount and/or time of his consumption of alcohol prior to the taking of his positive tests.

In the end, and although I may have taken a slightly different route to the result, I am not prepared to interfere with the suspension and fine that the Stewards imposed.

The Appellant's appeals against conviction and penalty are both dismissed.

There will be a direction that his 30 day suspension commence from midnight tonight.

There will also be a direction that the refundable portion of the bond be returned to the Appellant.