

Appeal Inquiry

Decision

*In the matter of an appeal from disciplinary
hearing held under the Convention
Against Doping in Sport Act No. 33 of
2013*

SL Anti-Doping Agency (Appellant)

V

Chelsea Melani Bendarage (Respondent)

Mr. Sumathi Dharmawardena PC

Chairman

Mr. Upali Samaraweera

Member

Dr. Asela Mendis

Member



The Appeal Panel heard the submissions made by the counsel of the Appellant and Respondent. In addition, both parties filed written submissions.

Summary of Facts

1. Miss. Chelsea Melani Bendarage (hereinafter referred to as "the Athlete") was tested "in competition" on the 14th October 2018 at the National Sports Festival held in Polonnaruwa, Sri Lanka. The number assigned to the sample collected is 4285281. The Athlete who was then a minor, had signed a consent form, while her mother, Mrs. Devika Lokusooriya, attested in the said form as the Athlete's representative.
2. The Athlete's urine sample bearing sample number 4285281 was sent to the National Dope Testing Laboratory (NDTL) in India (then a World Anti-Doping Agency (WADA) accredited laboratory. Sri Lanka Anti-Doping Agency (SLADA) received the report of the said "A" sample dated 01.02.2019. The sample "A" was found to be positive and the report states that:

"Adverse Analytical Finding for Oxandrolone, Epioxandrolone (Metabolite of Oxandrolone), 17b-hydroxymethyl-17a-methyl-18-nor-2-oxa-5a-androsta-13-en-3-one (Oxandrolone Long Term Metabolite-1) & 17a-hydroxymethyl-17b-methyl-18-nor-2-oxa-5a-androsta-13-en-3-one (Oxandrolone Long Term Metabolite-2), Anabolic steroids."

3. The presence of the prohibited substances in an athlete's urine sample prima facie constitutes an Anti-Doping Rule Violation under Article 2.1 of the WADA Code.

Preliminary Inquiry

4. In the event of a positive result, the Athlete should be given the opportunity to face a preliminary inquiry to state whether he/she wished to request for the testing of the B sample within the prescribed period of seven days starting from the date appeared on the testing report ("X2").
5. In this case, both the accused Athlete Miss. Chelsea Melani Bendarage and the Secretary of the Sri Lanka Athletics Association were informed by the letter dated 05.02.2019 of the results of the laboratory test report ("X2") and the Athlete was noticed to participate in the preliminary inquiry which was to be held on 07.02.2019.
6. Furthermore, a provisional suspension was imposed on the Athlete by the said letter dated 05.02.2019.
7. The Athlete, her father (Mr. B.D. Chandana Saman Bendarage), the Assistant Secretary of the Sri Lanka Athletics Association Mr. Bernard Perera, and the Vice President of the Sri Lanka Athletics Association Ms. Irangani Rupasinghe participated in the Preliminary Inquiry over the analysis of B Sample of the Athlete held on 07.02.2019, at the Sri Lankan Anti-Doping Agency.
8. Subsequent to the preliminary inquiry, the Athlete (now a major) gave her consent to SLADA by a letter dated 07.02.2019 to proceed with testing the "B" sample, and consequently the "B" sample of the urine sample bearing sample number 4285281 was tested by the National Dope Testing Laboratory (NDTL) in India (then a World Anti-Doping Agency (WADA) accredited laboratory), the sample laboratory which tested the "A" sample.



9. In the meantime, the Athlete by way of a letter dated 06.03.2019 sent by her Attorney at Law, alleged that on the same day information about the adverse analytical finding was conveyed to the Athlete, the said information also featured in several media reports in both print and electronic media and stated that the said publicity in the media and intense media scrutiny has severely impacted the Athlete.
10. Sri Lankan Anti-Doping Agency (SLADA) received the report of the said "B" sample dated 20.03.2019. The sample "B" was found to be positive and the report states that:

"Adverse Analytical Finding for Oxandrolone, Epioxandrolone (Metabolite of Oxandrolone), 17b-hydroxymethyl-17a-methyl-18-nor-2-oxa-5a-androsta-13-en-3-one (Oxandrolone Long Term Metabolite-1) & 17a-hydroxymethyl-17b-methyl-18-nor-2-oxa-5a-androsta-13-en-3-one (Oxandrolone Long Term Metabolite-2), Anabolic steroids."

11. The Athlete was informed of the "B" sample by SLADA, by way of the letter dated 21.03.2019.

Main Facts that Came Up for Argument at the Disciplinary Inquiry Stage

The disciplinary inquiry was held on 09.05.2019, 06.06.2019, 25.06.2019 and 02.07.2019.

- It was submitted by the Athlete's father that the Athlete had taken protein and vitamin supplements (as a nutritional supplement and not as enhancing substances) recommended to her by them (her parents) as she was a minor and was under the care of her parents.
- Athlete's father further stated that he purchased protein supplements (Nitrotech and MusclePharm) from Maggona area and gave them to his daughter.

The Athlete's father witnessed the supplement brands being sold inside the premises of the Sugathadasa Stadium where the All-Island School Games Athletics Championship meet was held.

- As per the father although he tried to buy the product from that stall, since stocks were not available, he bought the same branded product from another shop and provided that to her daughter. He believed that the said products were safe to be used as they were sold within the said premises on the day of the event which was organised by the Ministry of Sports.
- On behalf of the Appellant, it was submitted that the Doping Control Officer (DCO) and the Chaperone have not informed the Athlete of her rights and responsibilities before obtaining her consent and the urine sample for the doping test. This position was substantiated by the testimony of the DCO that it was not her duty to inform the Athlete of her rights and responsibilities and corroborated by the testimony of the mother of the Athlete.
- Athlete's Consent Form provided by SLADA to the Athlete at the time of collection of the sample is a near identical form of the WADA Doping Control Form, however, the annexures to the WADA Doping Control Form, which contained express information pertaining to the rights of the Athlete was not provided in the form SLADA provided to the athlete. Hence acknowledgment from the Athlete was received without her having read the rights and responsibilities (text on the overleaf of the form).

Disciplinary Inquiry

The Inquiry Panel having considered the submissions made by both the parties, stated in their decision dated 28th October 2019 as follows and same is reproduced for convenience.

- It was submitted on behalf of the Athlete that serious procedural violations, and dereliction of duties and responsibilities on the part of the Doping Control officer (DCO), and the*



Chaperone have taken place during the collection of the urine sample of the Athlete. In the elaborate written submissions submitted on behalf of the Athlete, it is stated that the Athlete was not made aware of her rights before obtaining her consent and the urine sample for the doping test. It is further submitted that this position was substantiated by the testimony of the DCO, that it was not her duty to inform the Athlete of her rights and responsibilities and corroborated by the testimony of the mother of the Athlete, who in providing evidence before this panel affirmed that she, as the guardian of the minor, was never informed about the Athlete's rights.

- ii. *It is further submitted on behalf of the Athlete that even the "Athlete's consent form" provided by SLADA to the Athlete at the time of collection of the sample is a near identical form of the WADA Doping Control Form, however, the annexures to the WADA Doping Control Form, which contained express information pertaining to the rights of the Athlete was not provided in the form SLADA provided to the Athlete, and it is alleged on behalf of the Athlete that this is a wilful and illegal omission on the part of SLADA, which does not meet the standards prescribed by WADA.*

Findings

- iii. *Article 2.1.1 of the WADA Code provides that:*

"it is each athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1"

It is established that Article 2.1 of the WADA Code imposes strict liability on athletes where urine/blood samples collected from an athlete have produced adverse analytical results. The rationale in imposing strict liability is elaborately discussed in the decision of the CAS

in USA Shooting & Quigley v International Shooting Union (UIT) [CAS 94/129], and this panel acknowledges the said dictum of the CAS.

iv. However, Article 10.4 of the WADA Code provides that:

“if an athlete or other Person establishes in an individual case that he or she bears no fault or negligence, then the otherwise applicable period of Ineligibility shall be eliminated.”

It is trite law that for the elimination of the period of ineligibility where there is No fault for Negligence under Article 10.4 of the WADA Code, the athlete must establish how the substance entered his/her body; and show that such specified substance was not intended to enhance his sport performance.

However, it is also significant to note that although WADA Code does not expressly protect minors, in the Appendix I of the WADA Code Minors ipso facto being Minors (i.e., Natural Persons who have not reached the age of eighteen years) are expressly exempted from certain requirements. In explaining “No Fault or Negligence” and “No Significant Fault or Negligence”, the Appendix I of the WADA Code expressly and explicitly exempts the Minors from the requirement that the accused athlete must “establish how the Prohibited Substance entered his or her system”. Furthermore, in explaining “Fault”, Appendix I of the WADA Code provides that whether the athlete or other person is a Minor is a factor “to be taken into consideration in assessing an athlete or other Person’s degree of fault”.

Hence in considering the WADA Code as a whole it is evident that Minors are treated differently in assessing the “no fault or negligence” pertaining to sanction as provided for in Article 10.4 of the WADA Code.

v. *At the time of the sample being taken, the athlete- Miss. Chelsea Melani Bendarage has not attained the age of 18, therefore she was then a Minor. This is undisputed by all parties.*



Therefore, considering the exemption provided in the Appendix I of the WADA Code, the Athlete in order to establish “no fault or negligence” does not have to establish how the substance entered her body.

- vi. *Considering that the Athlete’s unchallenged, untested, and not-contradicted evidence provided by way of an Affidavit, where the Athlete affirms that she took a protein supplement because of the reason that it was given to her by her parents, coupled with a fact that she is a minor girl from the rural south of the Country, this Panel is satisfied that the minor Athlete was not in control of what she consumed. This Panel acknowledges the fact that it is not uncommon, or rather very common in Sri Lankan society for a 17-year-old girl to be completely dependent on her parents. Therefore, this Panel finds no reason to suspect the minor Athlete’s testimony that she consumed protein supplement as it was provided to her by her parents.*
- vii. *It is noteworthy that CAS in A v Federation Internationale de Lutttes Associees [CAS 2000/A/317] held that mere fact that mislabelled supplement will not excuse a doping violation. CAS held that:*

“An athlete cannot exculpate himself/herself by simply stating that the container of the particular product taken by him/her did not specify that it contained a prohibited substance. It is obvious that the sale of nutritional supplements, many of which are available over the internet and thus sold without an effective governmental control, would go down dramatically if they properly declared that they contain (or could contain) substances prohibited under the rules governing certain sports. Therefore, to allow athletes the excuse that a nutritional supplement was mislabelled [sic] would provide an additional incentive for the producers to continue that practice.”
(Sic)

Appeal Against the Decision of the Disciplinary Inquiry Order dated 28th October 2019 by and between SLADA and Chelsea Melani Bendarage

On the ground of being aggrieved by the decision of the Disciplinary Inquiry dated 28th October 2019, Sri Lankan Anti-Doping Agency (hereinafter referred to as the "Appellant") appealed before the Honourable Appeal Panel of Sri Lanka Anti- Doping Agency under the Convention against Doping in Sports Act No.33 of 2013.

Written submissions on behalf of the Appellant were submitted on 19.02.2021 and written submissions in response to the written submissions of Appellant, on behalf of the Athlete (hereinafter referred to as the "Athlete Respondent") were submitted on 01.03.2021.

Position of the Appellant

- The Athlete-Respondent did not disclose the intake of any substance other than Panadol.
- The learned Disciplinary Panel has **erred in law** in sanctioning the Athlete-Respondent under averment 51 of the Disciplinary Inquiry decision as the Athlete-Respondent or her guardians have not proved that the said banned substance (Oxandrolone) was taken not on their fault or negligence.
- The burden of proof (to be greater than a mere balance of probability but less than a proof beyond a reasonable doubt) or strict liability is on the Athlete-Respondent and further under the WADA Code states that it is **not necessary** that intent, fault, negligence or knowing use on the Athlete's part be demonstrated by the Anti-Doping Organization in order to establish an anti-doping rule violation. (Article 2.1 WADA Code). Athlete has violated Article 2.1 of the Code by taking prohibited substances.

Two handwritten signatures in blue ink are located at the bottom right of the page. The first signature is a stylized, cursive 'b' followed by a large loop. The second signature is a more complex, cursive scribble.

- Appellant states that the Disciplinary Panel **should have imposed the maximum punishment** available to the Athlete. Disciplinary decision should be revised and Athlete should be sanctioned with four (4) years ineligibility.

Citing *CAS 2015/A/4273 World Anti-Doping Agency (WADA) v Sri Lanka Anti-Doping Agency (SLADA) and Done Dinuda Dashami Abeysekera* where WADA has challenged the legitimacy of the term of the ineligibility imposed upon the Athlete, Don Dinuda Dashami Abeysekera who was a **minor** at the time by the Disciplinary Panel of SLADA and WADA instituted an action in the Court of Arbitration in Sports (CAS) against Sri Lanka Anti- Doping Agency. There the Court of Arbitration **ordered to revise the decision given by the Disciplinary Panel of SLADA and recommended to impose the maximum punishment available to the Athlete.**

- Further Appellant states that **WADA Code has no section to minimize the period of suspension or exonerate an Athlete or afford special protection for minors from the charges** because he is a minor. Therefore, Disciplinary Panel has erred in law.
- Appellant has acted bona fide with regard to the suspension issue of National Dope Testing Laboratory (NDTL).

Position of Athlete-Respondent

- Athlete-Respondent was a minor at the time of the incident and is treated differently under WADA Code.
- SLADA has violated the Athlete-Respondent's rights guaranteed under the WADA Code by not following the required notification procedure stipulated in the Code.
- SLADA has acted in contravention of Article 14 of WADA Code which deals with confidentiality and reporting.

In response to written submissions of Appellant, Athlete-Respondent states that,

- Adverse Analytical Finding was a direct result of the Athlete-Respondent having taken the substance in nutrient form which was sold openly within the premises of Sugathadasa Stadium at a national sporting event.
- SLADA has erroneously stated that Athlete-Respondent accused the Sugathadasa National Sports Complex Authority of being vicariously liable for displaying and selling enhancing products. Athlete Respondent's father only informed the Disciplinary Inquiry Panel that in the evidence by him, that such substances were being sold inside the premises during the School Athletic Event organized by a Government body and it should have been investigated as to who gave approval for such products to be sold at a school meet and it was fair enough for the father to naturally and logically conclude that such product was safe for use and it is due to that reason that he purchased a similar product for his daughter.
- SLADA never bothered to cross examine the father of the Athlete-Respondent although evidence given by him through an affidavit was available to them days before the date of Disciplinary Inquiry.

Further the Athlete-Respondent states that;

- No matter how many times SLADA states that the WADA Code does not treat minors differently, it is manifestly clear that a minor Athlete is treated differently under the WADA Code.
- DCO having stated in her testimony that it is not her duty to inform the Athlete of her rights and responsibilities, it is a gross violation of the mandatory International Standards that SLADA is under an obligation to comply with.



- Further, the DCO admitted that the procedure and the documentation for collecting samples contains no overleaf which denotes any rights for processing of personal data.
- Despite adopting the near identical form as the WADA Doping Control Forms, SLADA has wilfully omitted all pages that relate to the rights of the Athlete, removed the requirements to inform the Athlete at least verbally the rights and privileges that are afforded to the Athlete when testing procedure is ongoing.
- There's systematic and manifest failure on the part of SLADA to adhere to the mandatory guidelines issued under the WADA Code and indeed to comply with the WADA Code.
- SALADA had several strict liabilities on their part, one being that the Doping Control Form presented to an athlete had to have the rights and privileges on the overleaf and further such rights had to be informed to the said Athlete.
- On the plain reading of the WADA Code that whilst the Code imposes strict liability with regard to a finding of a rule violation, an athlete's fault is taken into consideration in determine the consequences of that rule violation. (Article 2.1.1 read together with Article 10.4)
- SLADA should have informed us on the first instance when NDTL was on notice and suspended, and it was incumbent upon SLADA to inform the Athlete that the NDTL has been suspended as per the rules of natural justice and their failure to do so violate the rules of natural justice and usurps their responsibility towards the Athlete-Respondent.

The Appeal board having considered the above stated legal and factual matters decided as follows.

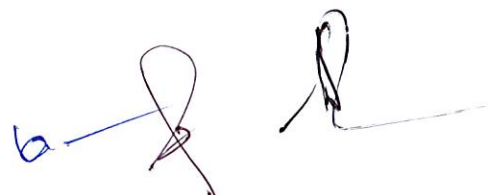
- a. The Appellant (Sri Lanka Anti-Doping Board) has failed to address the issue of the subject prohibited supplement “NitroTech” and “MusclePharm” being sold in a shop inside the

Government controlled National Stadium in Sri Lanka, which diminishes the presumption that it is a prohibited substance.

- b. The father of the Athlete-Respondent has accepted that he purchased the subject prohibited supplement “Nitro Tech” and “MusclePharm” after observing that said products were sold inside Sugathadasa Stadium under the control of the Government during the All-Island School Games Athletic Championship meet held on 05th of October 2018. His evidence was submitted via an affidavit and same was not challenged by the Appellant at the inquiry.
- c. The Respondent has taken up the position that at the stage of collecting the sample; The Appellant officials have obtained the consent of the Respondent (Athlete) to a form stating ‘Athlete’s Consent Form” which does not contain pages with regard to rights of the Athlete.
- d. The WADA Code is designed on the principle of strict liability and thus makes it imperative for the Appellant to follow a high standard of strict compliance. The above stated principle of strict liability was considered in Arbitration case CAS 2014/A/3487 Veronica Campbell-Brown v. JAAA & IAAF, award of 10 April 2014 (operative part of 24 February 2014) and held as follows.

“In order to justify imposing a regime of strict liability against athletes for breaches of anti-doping regulations, testing bodies should be held to an equivalent standard of strict compliance with mandatory international standards of testing. This is particularly important in view of the principal purpose of the WADA International Standards for Testing (IST), namely, to ensure “the integrity, security and identity of the Sample”. The need for a balanced approach to a regime of strict liability, on the one hand, and strict compliance with international standards, on the other, contributes to that purpose.

Certain IST requirements are so fundamental to the just and effective operation of the doping control system that fairness demands that any departure should automatically invalidate any adverse analytical finding. In other words, certain IST departures will be treated as so serious that, by their very nature, they will be considered to undermine



the fairness of the testing process to such an extent that it is impossible for a reviewing body to be comfortably satisfied that a doping violation has occurred.

The burden of proof shifts from the athlete onto the anti-doping organization when the athlete establishes facts from which a reviewing panel could rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete's sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible. This interpretation – which does not set the bar for a shift in the burden of proof to an unduly high threshold – strikes an appropriate balance between the rights of athletes to have their samples collected and tested in accordance with mandatory testing standards, and the legitimate interest in preventing athletes from escaping punishment for doping violations on the basis of inconsequential or minor technical infractions of the IST.

The burden of satisfying the relevant hearing panel that a doping violation has occurred is substantially higher where the anti-doping body has engaged in a knowing systematic and persistent failure to comply with a mandatory IST that is directed at the integrity of the sample collection and testing process. Strict liability for doping violations is an essential cornerstone of anti-doping enforcement. However, the ability of anti-doping agencies to hold athletes to that strict standard of accountability is necessarily attenuated in circumstances where those agencies manifestly and wilfully fail to uphold their side of the bargain. This is particularly so where the failure creates a possibility of sample contamination and unreliable testing results. In such cases, the IST departure strikes at the very heart and purpose of the anti-doping regime. To adopt a different approach might be said to encourage non-compliance with international standards and could render such standards a nullity.”

On careful consideration of Schedule B of International Standards for Testing (IST) of WADA, it appears that the officials of ~~WADA~~^{SLADA} have failed to adhere into procedure set out in IST with regard to minors.



As stated in above case CAS 2014/A/3487 Veronica Campbell-Brown v. JAAA & IAAF any deviation from IST procedures will reduce required high threshold of fairness of the Appellant. Thus, Appellant should not expect to impose the regime of strict liability against the Respondent- Athlete.

Due to above reasons, I reject the appeal.



Sumathi Dharmawardena PC 8/3/2021
Chairman

I agree.



Mr. Upali Samaraweera

Member

I agree.



Dr. Asela Mendis

Member