FINAL DECISION REPORT OF THE APPEAL INQUIRY

ATHLETE – SAJINI MANORI JAYASINGHA

SAMPLE NUMBER – 4285300

Appeal Inquiry

Decision

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

Sri Lanka Anti-Doping Agency, No. 363/12, Sugathadasa Stadium – Block D, Stadium Parking Road, Sirimavo Bandaranayaka Mawatha, Colombo 13.

AGENCY

and

Sajini Manori Jayasinghe

ATHLETE

And Now Between

Sajini Manori Jayasinghe

APPELLANT-ATHLETE

and

Sri Lanka Anti-Doping Agency

RESPONDENT-AGENCY

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.

Facts of the case

1. On 11th October 2018 Athlete Sajini Manori Jayasinghe (hereinafter referred to as "the Athlete") was tested randomly at the National Sports Festival held in Polonnaruwa. The testing was conducted by SLADA in accordance with the relevant procedures of WADA. However, the B sample was not tested since the Athlete and the Secretary of the Sri Lanka Kabaddi Association were informed by the letters dated 21.01.2019 of the results of the laboratory test report (A sample) and requested the athlete to participate in the Inquiry for B sample analysis.

2. The Athlete reported to the Respondent (SLADA) on 25.01.2019 and faced the Preliminary Inquiry and submitted her consent in writing that she will not proceed with the B sample testing. Thereby provincial suspension was imposed on the Athlete by letter dated 21.01.2019.

3. It is submitted that as per the report dated 18.01.2019 the Adverse Analytical Finding for ***Furosemide, Diuretics*** were contained in Athlete's urine sample, so the result was positive for doping.

4. Thereafter the Disciplinary Inquiry was held on 04.04.2019, 04.10.2019 as per provisions set out in the Convention Against Doping in Sports Act No. 33 of 2013.

5. At the Inquiry, the said Athlete stated that she has taken "Siddi Suwajeewanaya" (Native Herbal Drink) tea which comes in a tea bag, and thereby at the Inquiry the learned Disciplinary Panel instructed the Sri Lanka Anti-Doping Agency (herein after referred to as "SLADA") to do the testing of the said tea bag.

6. Thereafter, SLADA obtained the analysis certificate from **National Dangerous Drug Control Board**. As per the report dated 01.08.2018 the said tea sample did not reveal the possible substance "*Furosemide, Diuretics*".

7. After imposing a provincial suspension, the Athlete submitted a letter requesting to mitigate the sanction that may be imposed on her, which is stated in the decision of the Disciplinary Inquiry dated 29.01.2020.

The Disciplinary Inquiry

8. The Athlete at the Disciplinary Inquiry denied the charge on the basis that she has never taken any prohibited substance and further accepted that as stated above she opted not to proceed with Sample B testing.

9. The Disciplinary Panel held, "On the face of the facts of the Laboratory Reports marked "X2", Adverse Analytical findings are consistent with Furosemide, Diuretics which have been reported by the National Dope Testing Laboratory (NDTL) in respect of the Urine Sample A of the accused Athlete Ms.W.G. Sajini Manori Jayasinghe."

10. The Disciplinary Panel considered Article 2.1 of the WADA Code and stated that in the view of the above material it is evident that the said Athlete has violated Article 2.1 of WADA Code and has been established to the comfortable satisfaction of proof for the Disciplinary Inquiry panel to enforce sanction on her. Also, as per the section 3.1 of WADA Code, the required burden of proof is,

    "*greater than a mere balance of probability but less than a proof beyond a reasonable doubt*".

11. The disciplinary panel has unanimously imposed a sanction of Four (04) Years ineligibility period by the decision dated 29.01.2020 prohibiting engaging in all types of sports commencing from 11.10.2018 to 10.10.2022.

12. Thereafter the Athlete filed an appeal to SLADA Appeal Panel on 11.02.2020 to revise the said Order. The Appeal Inquiry was held on 14.07.2020, 16.09.2020 and 02.02.2021 and thereafter both parties filed written submissions.

Grounds of Appeal

The following grounds of appeal are urged on behalf of the Athlete – Appellant.

I. Patent lack of jurisdiction,
II. Contravention of the rules of Natural Justice and non-compliance by SLADA in discharging the burden of proof against the Athlete – Appellant,
III. Lack of procedural fairness,
IV. That the laboratory that tested the Athlete – Appellant's urine sample was on notice and subsequently suspended, a fact which was not disclosed to the Athlete – Appellant,
V. That in any case, and without prejudice to the preceding appeal grounds, the sentence and sanction imposed are contrary to the WADA Code.

The Appeal Panel having considered oral submissions and written submissions filed by both parties, concluded its decision as follows.

1. The Appellant at the stage of the appeal raised an objection with regard to patent lack of jurisdiction and made submissions to demonstrate a patent lack of jurisdictions on two grounds:
   a) The non-conformity of the Doping Control Form provided by SLADA with the WADA Code,
   b) The Doping Control Form Contravening Article 22 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

On consideration of the Disciplinary Inquiry proceedings, it appears that the Appellant has failed to raise the said objection in the Preliminary Inquiry as well as before the Disciplinary Inquiry. Thus, it is accepted that the said Preliminary Objection was raised for the first time before the Appeal Panel.

A patent lack of jurisdiction is twofold. A patent and latent lack of jurisdiction.
In ***Perera V. Commissioner of National Housing, (1974) 77 N.L.R.361*** Tennakoon C.J observed: -

> *"A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or a defectus triationis. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver, or inaction on the part of such person may estop him from making attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction."*

The Appellant has taken up the position that due to the failure by the Respondent -SLADA being a public institution and thereby falling within the purview of the Constitution, SLADA would have to carry out its business in Sinhala, or Tamil if the testing was done in the Northern or Eastern

Provinces. The Athlete – Appellant's sample was collected in Polonnaruwa situated in the North Central Province, and therefore, the Doping Control Form should have been in Sinhala, or at the very least, be bilingual in order to conform with the provisions of the Constitution. However, the Doping Control Forms used by Page 7 of 16 SLADA are only in English, thereby violating Article 22 of the Constitution and in turn violating the rights and protections afforded to the Athlete – Appellant as a citizen of Sri Lanka. The Constitution is the supreme law of the land.

In the subject matter, The Appellant was called upon to fill the said form in English language and the same will not amount to procedural irregularity which will fall within the ambit of the patent lack of jurisdiction. Further, as stated above the Athlete did not object to completing the subject form in English and did not object to the same at the time of filling said application nor raised this objection at the preliminary or the disciplinary inquiries.

The Court of Appeal in ***Rodriguo Vs Raymond*** reported in ***Sri Lanka Law Reports [2002] 2 page 78*** held

(i)It only creates a latent want of jurisdiction as opposed to total lack of jurisdiction or patent want of jurisdiction, where there is a latent want of jurisdiction it can be validated by the conduct of parties, such waiver, acquiescence, and inaction unlike in the case of total or patent want of jurisdiction, no such conduct will confer jurisdiction on the Court. CA ***Rodrigo v. Raymond*** *(Nanayakkara, J.) 79*

(ii) The defendant-petitioner has failed to formulate an issue relating to the jurisdiction of the Court at the commencement of the trial. His failure to frame an issue on such a vital matter will amount to a waiver of objections in regard to lack of jurisdiction of Court to hear and determine the respondent's action. The defendant-petitioner is deemed to have consented and submitted to the jurisdiction of the Court and he cannot now be permitted to challenge the jurisdiction.

On consideration of factual matters pertaining to the objection with regard to patent lack of jurisdiction, it appears that the Appellant has failed to object to filling of said form in English language and the same does not amount to a patent lack of jurisdiction. Further as stated in the

case of ***Rodriguo Vs Raymond***, a latent lack of jurisdiction will be validated by acquiescence and failure to raise an objection.
Due to above reasons, I reject the said Preliminary Objection.

I will be dealing with the rest of grounds of appeal together.

In the subject matter, the Appellant has opted not to proceed with Sample B testing and had denied that she took any prohibited substance. At this stage it is relevant to consider provisions set out in *Article* 3.2.2.

> *WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*

'Chain of custody' is defined in ISTI as the 'sequence of individuals or organization who have responsibility for the custody of a Sample from the provision of the Sample until the Sample has been delivered to the laboratory for analysis'.
As per the WADA Code and the instructions given to Doping Control Officers (DCO) with regard to 'Chain of Custody', section 3 on Chain of Custody, transportation, and Storage, of the said document (page 105-107 of the Athlete-Appellant's documents) specifies that every change in custody of the samples must be recorded.
In any case there are two chains of custody that must be scrutinized.
The external chain of custody which applies from the time the sample is taken to the time it reaches the testing lab and the internal chain of custody which refers to the chain of custody inside the testing lab. Both chains must be specifically recorded and proved.

The Athlete-Appellant having been concerned with the external chain of custody, alleges a break in the said chain of custody from,

i. Dr. Seevali Jaywickrama at 1340 hours on 11.10.2018 to an unnamed person at 2000 hours on 11.10.2018 and from,
ii. The particular unnamed person at 2000 hours on 11.10.2018 to 'Saman' at 0300 hours on 15.10.2018 and then again from,
iii. 'Saman' at 0300 hours on 15.10.2018 to Dr. Shiromi De Alwis at 1320 hours on 15.10.2018.

It is therefore submitted by the Athlete Appellant that the said break in chain raises the issues of lack of chain of custody documentation contrary to the WADA Code and ISTI Guidelines, which on its own should be sufficient to vitiate the finding of the Disciplinary Inquiry.

It is submitted by the Athlete-Appellant that the failure on the part of SLADA to adhere to the mandatory guidelines of WADA which specifically require them to meticulously record every change in custody has manifestly and willfully failed to uphold the standards required by law. This failure, coupled with the failure to adhere to the WADA Code relating to the sample collection process demonstrates a knowing, systematic, and persistent failure to comply with mandatory guidelines that SLADA is entrusted with adhering to.

Furthermore, it is also submitted, that regardless of whether the chain of custody was objected to at the Disciplinary Inquiry, there is a burden on the SLADA to prove the chain of custody. The burden will only shift to the Athlete-Appellant to prove any issues relating to the chain of custody, only if SLADA has discharged its burden of proof, and it is respectfully submitted that SLADA has failed to do so in the given instance.

The WADA Code is designed on the principle of strict liability and thus makes it imperative for the Respondent 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 standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than a proof beyond a reasonable doubt (Article 3.1 of the WADA Code)

The Appeal Panel having considered the above issue raised the following questions to the Appellant by letter dated 18th September 2020.

i. *When the Appellant – Athlete's sample (Sample Code 4285300) was sent to NDTL (22nd October 2018) and during the dates when the said sample was tested, that is, during the period of 24th October 2018 – 18th January 2019, was the laboratory under scrutiny?*
ii. *On what grounds was the NDTL suspended?*
iii. *Was the NDTL found guilty of any malpractices in 2018?*
iv. *Has the WADA taken a decision to scrutinize NDTL reports submitted from September 2018 to up to the date of suspension?*

The Appellant, by forwarding the above questions to The Manager Legal Affairs of WADA by email dated 30th September 2020, received a reply by the said Manager, as follows;

"As has been stated before and as stated in WADA's press releases, the WADA -accredited laboratory in New Delhi, India (NDTL) has been suspended since August 2019 for some non-conformities with the International Standard for Laboratories (ISL).
One of the issues that lead to the suspension was NDTL's IRMS method. For all AAFs which did not require IRMS (including this matter as the athlete tested positive for furosemide), there is no evidence to support that this result may have been misreported" (SIC).

On a careful consideration of above stated questions against the response from WADA it is abundantly clear that the said WADA response has failed to give direct replies to questions i to iii. Instead, WADA in its reply has drawn to its press release which was submitted by the Respondent. Now, I will turn to WADA press release dated 22nd August 2019 which states as follows.

"The World Anti-Doping Agency (WADA) has suspended the accreditation of the National Dope Testing Laboratory (NDTL) in New Delhi, India, for a period of up to six months.
This suspension has been imposed due to non-conformities with the International Standard for Laboratories (ISL) as identified during a WADA site visit, including in relation to the laboratory's isotope ratio mass spectrometry (GC/C/IRMS) analytical method, as regulated by the relevant technical document (TD2016IRMS).
In May 2019, disciplinary proceedings were initiated by WADA's Laboratory Expert Group (LabEG) and subsequently carried out by an Independent Disciplinary Committee, which was

mandated to make a recommendation to the Chair of the WADA Executive Committee regarding the status of the laboratory's accreditation. This process is now complete."

The Appellant was subjected to a 4-year sanction which was imposed on 29.01.2020 for a violation of Article 2.1 of the World Anti-Doping Code (WADA Code) with effect from 11.10.2018 until 10.10.2022 by the Disciplinary Inquiry Panel.
As for now the Appellant has served ban of 02 years and 05 months.

At this stage I will turn to comment given by WADA for Article 3.2.2. which states,

> *"The burden is on the Athlete or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. Thus, once the Athlete or other Person establishes the departure by a balance of probability, the Athlete or other Person's burden on causation is the somewhat lower standard of proof could reasonably have caused.*
> *If the Athlete or other Person satisfies this standard, the burden shifts to the Anti-Doping Organization to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding."*

In this matter the Appellant has submitted documentary proof that NDTL has failed to maintain the required International Standard and after failing to adhere to WADA advice, NDTL was suspended by WADA.
At this stage, I need to consider whether the Respondent has discharged his burden of proof on a level of comfortable satisfaction that the said failure of NDTL to maintain required ISL did not cause the Adverse Analytical Finding.
On inquiry made by the Respondent, WADA states that there is no evidence to support that this result may have been misreported. The Respondent has submitted the said letter of WADA. The said letter lacks any scientific evidence to maintain that the said failure of NDTL to maintain required ISL did not cause the Adverse Analytical Finding.

It is abundantly clear that the NDTL failed to adhere to International Standard for Laboratories (ISL) and disciplinary procedure was only commenced in May 2019. It appears from the said statements of WADA that NDTL's failure to adhere to the required ISL has been prior to May 2019. The Respondent has failed to prove to the comfortable satisfaction of this Appeal Panel that the said departure from the required ISL did not cause the adverse findings of the Appellant-Athlete. The Manager, Legal Affairs of WADA, stated that there is no evidence to support that this may have been misreported.

On consideration of the WADA requirements to follow the regime of strict liability as considered in the above stated ***Veronica Campbell-Brown case***, it is an imperative requirement for the National Sports Bodies, National Anti-Doping Agency, and testing bodies (laboratories) to follow strict compliance. However, in this instance, it is abundantly clear that the Respondent (SLADA) and NDTL have failed to follow strict compliance and maintained required ISL.

Due to the above reasons, I uphold the appeal and quash the decision made by the Disciplinary Panel.

Sumathi Dharmawardena PC
Chairman 11.3.2021

I agree.
Mr. Upali Samaraweera
Member

I agree.
Dr. Asela Mendis
Member