

## **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**

**Hewa Kumarage Kalinga Kumarage, No. 18 Sangamitha Mw, Pallewella.**

**ATHLETE**

### **And Now Between**

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

**AGENCY-APPELLANT**

**and**

**Hewa Kumarage Kalinga Kumarage, No. 18 Sangamitha Mw, Pallewella.**

**ATHLETE-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.

### **Facts of the case**

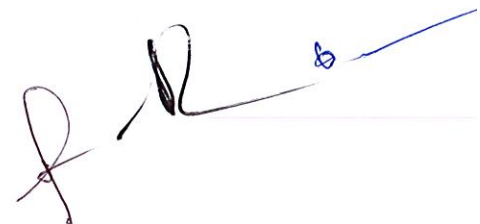
1. Kalinga Kumarage represents Sri Lanka at athletic events, with his main event being the **400m** and the **400m** Relay. The Athlete also serves in the Sri Lanka Army Electrical & Mechanical Engineering Regiment. During the 55<sup>th</sup> Army Meet on 29-10-2018 and 30-10-2018, the Athlete took part in multiple events not limited to his main events, on behalf of his Regiment.
2. On or around 31-10-2018 the Athlete's urine samples were collected subjecting him to a random doping test. Both A & B samples were collected and tested by the National Dope Testing Laboratory – New Delhi, and subsequently, were returned with an Adverse Analytical Finding [*hereinafter sometimes referred to as AAF*] for *Dehydrochlormethyltestosterone LTM* of an exiguous concentration of **<2ng/mL** .
3. The Athlete took up the defense by taking up the position that he never knowingly or intentionally ingested any prohibited substance.
4. The Respondent-Athlete submitted a Report prepared by the Head of the Department of Pathology of the North Colombo Teaching Hospital, Dr. B.K.T.P. Dayanath clearly indicated that the **exposure to the prohibited substance was not regular and was unintentional**. Furthermore, such prohibited substance is one which affects, amongst other things, muscle size and red blood cell production, and a substance more beneficial to sports which are linked with a weight class. Most anti-doping rule violations involving this prohibited substance have been in relation to weightlifting, martial arts and boxing [*vide* paragraph **21** written submissions of the Athlete dated 04-09-2019].
5. A Disciplinary Inquiry was held against the Athlete and while the Honourable Disciplinary Panel had permitted the parties to tender written submissions, the Athlete became aware that the National Dope Testing Laboratory – New Delhi had been **suspended** by the World Anti-Doping Agency [*hereinafter sometimes referred to as*

WADA] on or around 20-08-2019 for non-conformities with the International Standards for Laboratories [vide further written submission of the Athlete].

6. The Honourable Disciplinary Panel, having given opportunity for both parties to be heard by permitting the parties to make oral submissions, and to tender further written submissions on the issue of the suspension of the laboratory; although SLADA failed to make such written submissions; held that SLADA has not established with the required standard of proof that an anti-doping rule violation had occurred [vide paragraph 49 of the Order dated 28-11-2019].

#### **Preliminary Objection by the Respondent**

7. The Athlete by way of an Affidavit dated 27-08-2020 took up a preliminary objection to the instant appeal on the grounds that no substantive appeal has been filed by SLADA, and that no grounds of appeal had been stated in the purported appeal, resulting in a denial of a fair hearing to the Athlete.
8. When this matter was first called for hearing, it was brought to the attention of the Appeal Panel that SLADA had failed to provide notice to the Appellant with a Petition of Appeal and documents pertaining to this purported Appeal. Thereafter, as per the direction of Your Honours' Panel, SLADA served on the Athlete a letter dated 05-12-2019 and documents. Such letter contains a bold statement as "Since we aggrieved by the aforesaid decision we hereby Appeal for the honorable appeal committee of Sri Lanka Anti-Doping Agency under the Convention against Doping in Sport act No 33 of 2013", without even stating the grounds of appeal relied upon by SLADA. It is our submission that a mere statement of this nature does not constitute an appeal, and in fact, that it knowingly and maliciously prevents the Athlete from knowing the purported case against him, thus depriving him of a fair hearing contrary to the basic principles of Natural Justice.





## **The Appellant's Position**

9. The Appellant (SLADA) by way of written submissions dated 23-02-2021 took up the position that the Appellant filed the Appeal according to Section 26(1)(a) of the Convention Against Doping in Sports Act No 33 of 2013, The Appellant as the aggrieved party filed the Appeal within 14 days' time (on 05<sup>th</sup> December 2019). And the Appeal copy was handed over to the address of the legal counsel of the said Athlete as well as another copy was sent under the registered post to the given address of the Athlete on the same day.

10. The learned counsel appearing for the Athlete Respondent raised a preliminary objection that he has not received the Appeal paper filed by SLADA. We respectfully submitted that SLADA has filed the Appeal papers as per the Convention Against Doping in Sports Act No. 33 of 2013, more fully specified in the section 26(1)(a).

11. Therefore, we respectfully submitted that the Athlete's said preliminary objection cannot be maintained as a valid preliminary objection and it is null and void

12. We further submitted that a petition could be a formal written request which has been signed by the aggrieved party and filed within 14 days' time to the Appeal inquiry Panel with notice to relevant parties. Therefore, we respectfully move that this Appeal is a valid Appeal since it is in accordance with the section 26(1)(a) in the Convention Against Doping in Sports Act No. 33 of 2013.

13. We hereby further submitted that, the learned Disciplinary Panel has not considered the actual rule violation as per the WADA code, and they have not considered the rules regarding threshold limits, specially the section 2.1.3 of the code.

14. Finally, it is submitted that the learned Disciplinary Inquiry Panel decision is error in law.

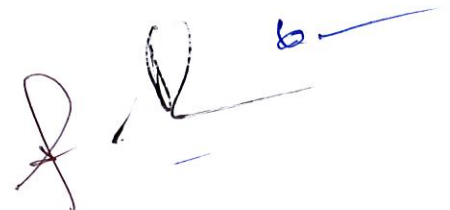
- a) As per the WADA code Section 2.1.3 the said Athlete has clearly violated the Anti-Doping rules. Morefully, the section doesn't specify the quantity of the prohibited substance or its metabolites or markers in the Athlete's sample. Therefore, the learned disciplinary panel decision is error in law as per the WADA rules.
- b) Also, it is submitted that, responding to the only defense of **no threshold limit** indicated in the adverse analytical finding, SLADA states as, World Anti-Doping Agency annually declares the list of prohibited substances. Since *Dehydrochloromethyltestosterone* is an Exogenous Anabolic Androgenic Steroid (as per the prohibited list 2018) that does not require a threshold value (**non-threshold substance**). As per the said prohibited list it is very clearly mentioned that just the presence of the metabolite would make the urine sample positive.
- c) e hereby further submitted that, the learned Disciplinary Panel has not considered the actual rule violation as per the WADA code, and they have not considered the rules regarding threshold limits, specially the section 2.1.3 of the code.

“2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the *Prohibited List*, the presence of any quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an Athlete's Sample shall constitute an anti-doping rule violation.”

Therefore, it is submitted that, to prove the violation under Section 2.1.3 of WADA code, this particular Anabolic Steroid does not require a threshold “requirement’.

15. Therefore, it is submitted that, to prove the violation under Section 2.1.3 of WADA code, this particular Anabolic Steroid does not require a threshold “requirement’.

16. Therefore, we respectfully of the view that the said athlete has violated the Article 2.1 of WADA code and therefore this decision should be revised and enforce Four (04) years of ineligibility period against the said Athlete from the date of violation.

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## **Decision of the Appeal Panel**

The Appeal Panel considered the Preliminary Objection raised by the Respondent especially with regard to their failure to state grounds of the appeal and only submitting a mere statement as follows;

“Since we aggrieved by the aforesaid decision we hereby Appeal for the honorable appeal committee of Sri Lanka Anti-Doping Agency under the Convention against Doping in Sport act No 33 of 2013”

The above stated statement does not state any grounds for appeal which normally should consist of on what grounds the Appellant challenges the decision of the Inquiry Panel.

However, the Appeal Panel is of the opinion that the grounds urged by the Respondent to the effect that the Appellant (SLADA) relying on the laboratory report of the NDTL of India which was suspended by WADA, amounts to failure to discharge duties under the regime of strict liability, is noteworthy.

The WADA Code based on the regime of strict liability imposes the burden on the Athlete to ensure that no prohibited substance shall enter his body and if so, the same will constitute an anti-doping rule violation (Section 2.1 and 2.2 of the WADA Code). In order to apply this regime of strict liability, the Appellant is bound to follow strict compliance of the WADA Code and the procedure set out in the International Standards for Testing.

The principle of strict liability was considered in the 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;

*“1. 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.*

*2. 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.*

*3. 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.*

*4. 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 proof beyond a reasonable doubt (Article 3.1 of the WADA Code)*

One of the congenital proof of evidence as per WADA code is the analytical finding by a WADA accredited laboratory. Based on the Respondent's position that the National Dope Testing Laboratory – New Delhi (NDTL) had been **suspended** by the World Anti-Doping Agency, I wish to consider provisions set out in the Article 3.2.2 of the WADA Code:

Article 3.2.2

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*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.*

The Inquiry Panel considered the Respondent's objection that NDTL was suspended by the WADA; which was supported by news published in the WADA website, as per the submissions of the Respondent that the sample testing results were inaccurate and erroneous due to the failure of NDTL to maintain required standards was proved due to its suspension by WADA. As per Article 3.2.2 on the reasons set out by the Respondent duty will be shifted to the Appellant to rebut this position.

The Appeal Panel having considered the above issue, raised the following questions with the Appellant by letter dated 18<sup>th</sup> 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 forwarded the above questions to The Manager, Legal affairs of WADA and by email dated 30<sup>th</sup> September 2020, the said Manager replied 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 led 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., especially whether during the relevant period (October 2018) NDTL was under the scrutiny of WADA. Instead, WADA in its reply has drawn to its press releases, which were submitted by the Respondent.

Now, I will turn to the WADA press release dated 22<sup>nd</sup> 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.”*

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 Appellant 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 Respondent. The Manager, Legal affairs of WADA, stated that **there is no evidence to support that this result 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 testing bodies (laboratories) to follow strict compliance. However, in this instance, it is abundantly clear that NDTL has failed to follow strict compliance and maintained the required ISL.

Due to the above reasons, I am of the opinion that The Appellant (SLADA) has failed to rebut the position of the Respondent to comfortable satisfaction of this Appeal Panel.

Due to the above stated reasons I dismiss the appeal of the Appellant which has failed to disclose any grounds of appeal.

  
Sumathi Dharmawardena PC

Chairman

I agree

  
Mr. Upali Samaraweera

Member

I agree

  
Dr. Asela Mendis

Member