

Assessing Threshold for Doping Violation in Sports: CAS Award Swims in Deep Waters

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The Court of Arbitration for Sport (“**CAS**”) has once again in a recent case demoted the burden of proof for an athlete seeking to show they did not commit an Anti-Doping Rule Violation (“**ADRV**”). The World Anti-Doping Code (“**WADC**”) provides that an athlete who is found to have committed an ADRV involving a prohibited substance is subject to an ineligibility of four years from participation in future events. The athlete has the possibility to avoid or reduce the sanction if they can establish to the satisfaction of the CAS how the substance entered their system, demonstrate that they were not at fault, or that they did not intend to enhance performance. In this post, I highlight how a trilogy of CAS cases shows that different standards have been adopted by CAS panels for reaching their conclusions on these issues, creating a lack of consistency, emergence of uncertainty and an imminent need for uniformity in the realm of doping in sport.

Maurico Fiol Villanueva v. FINA, CAS 2016/A/4534

In March 2017, a CAS panel upheld the decision rendered by the Fédération Internationale de Natation (“**FINA**”). Prior to competing in the Pan-Am games, the athlete underwent a doping control test. The result rendered an adverse finding for

a prohibited substance. FINA sanctioned the Peruvian swimmer with a four-year ineligibility for ADRV.

Before CAS, the athlete argued that he did not intend to cheat or be negligent and advanced the theory that the source of the prohibited substance was contaminated horse meat sold as beef which he had consumed. The athlete sought an order for annulling or reducing the sanction.

The CAS panel held that, while the determination of the origin of the prohibited substance represents a crucial element in the analysis of an athlete's degree of fault, "*a narrow corridor*" remains open for the athlete to establish their absence of intent to cheat despite being unable to identify the source of the prohibited substance causing the ADRV. However, the CAS panel concluded that the athlete only gave evidence as to what substances he consumed which did not contain the prohibited substance, but had failed to prove what substance he had consumed, with no intention to commit ADRV, that contained the prohibited substance. The horse meat theory advanced by the athlete was struck down by the CAS panel as being inconclusive. The CAS panel ruled that the athlete was unable to pass through the "*narrow corridor*", and upheld the four-year ineligibility as the athlete failed to discharge the burden of lack of intent.

Jarrison Lawson v. IAAF, CAS 2019/A/6313

In March 2020, the CAS panel set aside a decision rendered by the International Association of Athletics Federations ("**IAAF**") and held that no period of ineligibility should be imposed on an American track and field athlete as the athlete was able to demonstrate that they bore no fault or negligence for ingesting the prohibited substance. At an out-of-competition doping test, the athlete tested positive for a prohibited substance. IAAF concluded that the athlete had committed an ADRV and sanctioned him with a four-year ineligibility.

The athlete requested CAS for reduction or removal of the sanction on the basis that he bore no fault or negligence. The athlete alleged that the prohibited substance was contaminated beef consumed in a restaurant the day before the test.

The athlete was only able to provide a mere hypothesis of how the prohibited

substance entered his system but was unable to shift the burden that the ingestion was not intentional. Referring to *Villaneuva*, the CAS panel held that the so-called “*narrow corridor*” must be sufficiently narrow to prevent intentionally doped athletes with a means of evading due sanctions, yet still wide enough to allow unintentionally doped athletes an opportunity to exculpate themselves by means of relevant and convincing evidence.

The CAS panel observed that it was effectively impossible in the present case for the athlete to adduce actual evidence or concrete origin of the prohibited substance. On the balance of probability, the CAS panel accepted the theory advanced by the athlete regarding origin of the prohibited substance. In the light of the evidence and the testimony proffered by the athlete concerning his disdain for cheating and attitude to clean sport, the CAS panel held that the athlete had established that he bore no fault or negligence for the positive finding. Although the CAS panel noted that the athlete committed ADRV but ruled that no period of ineligibility shall be imposed on him.

Shayna Jack v. Swimming Australia & Australian Sports Anti-Doping Authority, CAS A1/2020

In November 2020, a CAS panel, while upholding ADRV committed by an Australian swimmer, reduced the sanction from four years to two years. In an out-of-competition doping test, the athlete tested positive for a prohibited substance under WADC. Australian Sports Anti-Doping Authority (now known as “Sport Integrity Australia”) (“**SIA**”) imposed a four-year period of ineligibility for ADRV.

In her challenge before CAS, the athlete conceded to have committed ADRV. She maintained that the ADRV was not intentional. However, she failed to demonstrate how the prohibited substance entered her system. She put forward several speculations, including contamination of food and supplements that she had used. She argued that, as she bore no fault or negligence for ADRV, the sanction should be eliminated or reduced.

The CAS panel did not accept the speculations advanced by the athlete. While the CAS panel held that the athlete failed to discharge the onus to indicate the source of the substance and establish ADRV was not intentional, the CAS panel also held that there is no strict need for the athlete to do so. The CAS panel considered the

"narrow corridor" approach to be unwarranted stating that the same poses practical difficulties. Rather, the CAS panel proposed that the proper approach is to determine whether, on the totality of the evidence, the athlete has proven on the balance of probabilities that she did or did not attempt to cheat.

In the light of the athlete being a credible witness, being emphatic about not intentionally taking the prohibited substance and taking considerable steps to ascertain the origin, the CAS panel held that the athlete presented herself to be a person who was unlikely to intentionally or recklessly ingest a prohibited substance. On this basis, the CAS panel concluded that the athlete discharged the onus of showing that the ADRV was not intentional. The CAS panel, therefore, ruled that the athlete discharged her onus and reduced the sanction of ineligibly to two years.

Imminent Need for Uniformity by CAS

It can be seen from this trilogy of cases how CAS panels have reached different conclusions adopting separate standards for similar factual scenarios. The CAS panel in *Villaneuva* developed the notion of *"narrow corridor"* but failed to indicate the parameters of it and decided not to interfere with the imposition of the four-year sanction. In *Jarrison Lawson*, the CAS panel accepted the speculative theory advanced by the athlete, let the athlete pass through the *"narrow corridor"* and ruled that no period of ineligibility shall be imposed on him even though the athlete failed to provide any proof for his theory. On the other hand, the CAS panel in *Shayna Jack*, wholly unpersuaded by the athlete's attempts to establish innocence through speculative theories, disregarded the *"narrow corridor"* approach and on the mere statement and demeanour of the athlete, reduced the sanction to two years. There is clearly a lack of consensus and standard being adopted by CAS.

Under WADC 2003, the basic sanction for a first offence of ADRV was two years. Under WADC 2009, it became two years, subject to increase to four years in circumstances of aggravation. Under WADC 2015, it became four years, subject to decrease in circumstances of mitigation by proving innocence. The sanctions screw was tightened in an effort to rid sport of the scourge of doping. Guarding sport against doping is fundamental to the ability to hold fair sporting events and

funding them. It has long been the rule that athletes are held to a high standard of accountability when it comes to prohibited substances found in their bodies.

While the tightening of the screw is indeed understandable, the same cannot be said of the possibility to decrease the sanction in case of mitigating circumstances, or at least of the varying interpretations that have been advanced in this respect. Sanctions should not be eliminated or reduced on the mere assertion, speculative theories or demeanor of an athlete. This can be contrasted with guilty pleas to criminal charges in most countries which conventionally attract a discount on the penalty. It should be kept in consideration that an athlete may lie so as to gain the chance of a reduction of sanction to which they would not be entitled to ordinarily. Spiking and contamination may occur without any intent, however, it is too easy to assert and admit either.

CAS must adopt an appropriate and uniform approach in all such cases, i.e. in furtherance of the assertion, the athlete must adduce specific, hard and concrete evidence to prove the absence of intent to cheat, and in absence of any such proof, CAS should not eliminate or reduce sanctions. In other words, WADC should be amended accordingly so as to differentiate the guilty-minded athletes from the innocent. While the good faith rule should be kept in mind, it cannot be the basis to ascertain guilt. More concrete evidence must be required by proof given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter athlete's body.