

JUDICIAL AWARD BY THE FISA DOPING HEARING PANEL

sitting in the following composition

Members: **John Boulton**
 Mikio Hiura
 Mike Williams

In the case of Nayara Furtado Pena

The Facts

FISA conducted anti-doping testing in Rio de Janeiro on 28 May 2015. A urine sample was collected from Nayara Furtado Pena ("the Athlete"). The Autoridade Brasileira de Controle de Dopagem (ABCD) conducted the testing on behalf of FISA.

The urine Sample collected from the Athlete was numbered 2858975 and recorded on the Doping Control Form. The Athlete signed this form and received a copy. Nayara Furtado Pena declared on the doping control form that she had taken several products during the seven days before the test, including whey protein, dextrose, BCAA, maltodextrine, and two others which are unreadable. She made no comments on the doping control procedure on the form. The WADA accredited laboratory in Rio received the "A and B" urine samples on 29 May 2015.

The Results from the Rio Laboratory dated 12 June 2015 indicate that Sample A showed the presence of stanozolol. Stanozolol is included in the 2015 Prohibited Substances/Methods List of the World Anti-Doping Code and is classified in class S1 Anabolic Agents.

Some departures from the International Standard for Testing (ISL) have been established as having occurred during the testing procedure. These are listed below. The Athlete does not have a valid TUE.

The Athlete was notified of the positive test result by the Executive Director of FISA in a letter dated 29 June 2015. She confirmed through her lawyer by faxed letter dated 3 July 2015 that she wished to have the B sample analysed.

On 15 July 2015, the control analysis began with the Athlete present at the Laboratory. The "B" analysis confirmed that of the "A" sample.

The hearing took place on 8 August in Rio de Janeiro. The Athlete attended the hearing and was assisted by a lawyer, Rodrigo Martins.

The Brazil Rowing Federation was present as an observer through Thomas de Souza Schwerdtner, Secretary General and Marisa Beraga Barreiros, Administrative Assistant. Daniela Gomes da Costa from FISA acted as Portuguese/English interpreter.

Evidence Provided for the Hearing

The material provided to the Panel was as follows:

1. Doping control form of 28 May 2015
2. A sample analysis dated 12 June 2015
3. B sample analysis dated 15 July 2015
4. Letter from the FISA Executive Director to the Brazil federation dated 29 June 2015
5. Statement from the Athlete dated 5 August 2015 (written in Portuguese and translated into English).

Witnesses

The following witnesses gave evidence:

1. The Athlete Nayara Furtado Pena.
2. Carolina de Carvalho Corado, another Brazilian rowing athlete who attended the anti-doping testing on 28 May.
3. Sophia Camara, another Brazilian rowing athlete who attended the anti-doping testing on 28 May.
4. Sandra Soldan, the Doping Control Officer who conducted the testing on 28 May.

The hearing was also heard in conjunction with the hearing of Beatriz Tavares Cardoso who was tested on the same day, and the evidence from the witnesses de Carvalho, Camara and Soldan was used in both cases.

Applicable law

The applicable rules

The applicable rules are the FISA Anti-Doping Rules in force at the time of the test (28 May 2015). These rules are consistent with the World Anti-Doping Code.

The relevant rules

The Panel considered in particular but was not limited to the following FISA anti-doping rules in this case:

- Article 2.1.1 which states it is each Rower's personal duty to ensure no Prohibited Substance enters his body;
- Article 3 - Proof of Doping; especially Article 3.2.3 – Departures from International Standards
- Article 5 – Testing and Investigations; especially Article 5.1 which specifies that testing is to be conducted in conformity with the provisions of the International Standard for Testing and Investigations.
- Article 10.2.1 which sets a period of four years' ineligibility for a first violation for a prohibited substance.
- Article 10.5 – No significant fault or negligence

The Panel also considered:

The WADA Prohibited List (2015)

The WADA International Standard for Testing and Investigation (January 2015) and in particular:

Article 5.4: Requirements for Notification of Athletes

Article 7.4: Requirements for Sample Collection

Article 8.3: Requirements for security/post-test administration

Annex D: Collection of Urine Samples

Evidence heard at the hearing

The Athlete Nayara Furtado Pena

She gave the following evidence:

On 28 May the races were cancelled. Sandra Soltan (DCO) arrived about 7 a.m. with a list of athletes to be tested.

The athletes gathered in a room, and were tested in the order they arrived. Some athletes were on the water and others went home or to their clubs unaccompanied.

The DCO was on her own, and when she went with athletes to the bathroom to provide a sample, the room where the sample kits etc were was unattended. There were people around who were not involved in the testing.

When she went to the bathroom to provide a sample with Sandra Soldan, the room was left unattended. She took about 7 minutes to produce a sample. She filled the receptacle. She poured the urine into one bottle only and then being nervous she put the receptacle in the trash can. Sandra Soldan took the receptacle out of the trash can. There were other receptacles in the trash can with urine in them. She is not sure that it was her receptacle and urine which Sandra Soldan took out of the trash can. Sandra Soldan then poured the urine into a second bottle. Then she used left over urine to do a further process with it.

She was offered more than one receptacle to use for urine collection. There were several in a box. Each was in a plastic sleeve.

After passing urine she was offered several boxes and chose one. The box was sealed. She could not remember if the bottles were sealed. She sealed the bottles after the urine was poured into them.

She was not asked to check the numbers on the bottles, box and form.

She was not informed of the opportunity to make any comments on the form.

She was told that she did not have to put a medication that she was using for a cough – Benalet – on the form, but she put other medications on the form.

She only read parts of the form to check the name, address and the supplements/medications written. However she said she did read the part about comments on the form.

She cannot explain how stanozolol appeared in the sample.

As far as supplements are concerned, she has never been able to afford them, but the nutritionist told her they were important so she started to use them, and they are noted on the form. She did not suggest that the stanozolol came from the supplements. They were bought by the coach from her club, Marcos Amorin, who spoke to the nutritionist, Henrique Vieira.

She said there was no chance of anyone tampering with her samples bottle.

Carolina de Carvalho Corado

She is a rower from the Flamengo club.

She gave evidence that she was present but was not tested on 28 May. She was told that 16 athletes had been tested so she would not be needed. When she arrived there was a list of 18 persons and she was told by the coaches that she on that list. She and her partner

went and had coffee and a shower and came back later. Her partner was the last person tested.

She said there was only one person testing, and there was no back up with a lot of people. The coach was with the male rowers and was not there the whole time. At times the samples room was left unattended when the DCO went to the bathroom with the female athletes.

Sophia Camara

On 28 May, the athletes themselves more or less decided the time to be tested. She and her partner Carolina were the last due to be tested. They went to the club and had a shower etc. There were a lot of athletes waiting to be tested. There was only one tester and the whole thing took about 3 hours. She was tested, and afterwards went home. She had a choice of receptacles, and of sealed boxes of sample bottles. The bottles were sealed. She distributed the urine into the bottles. She also checked the numbers on the bottles and the form. When she went into the bathroom to provide the sample, no-one was left in the samples room. This was different from other testing she has done.

Sandra Soldan

She had given evidence to the Panel in the case of Kissya Cataldo da Costa on 7 August about the testing day on 28 May. The evidence she gave on that occasion was:

- She has been a DCO since 2007, working mostly with Brazilian swimming.
- On 28 May she did testing on rowers on behalf of ABCD. She had a list of 18 athletes. She did not have a male chaperone, having been asked to do the testing with just a short time to organize it, and asked Marcos Amarin to assist as chaperone. He also was the one who notified the athletes to be tested.
- She agreed that she did not advise athletes that they could have a representative accompany them to the testing.
- Each athlete was given a choice to select from 3 collection vessels to urinate into and then 3 kits to select for the sample bottles.
- The collection vessels have a sealed bag which the athlete takes the vessel out of to go to the bathroom.
- The athlete chooses 1 kit out of 3 sample kits and checks to see that it is well sealed. The athlete is asked to check the numbers on the box, and bottles stickers. The athlete takes the bottles out of the sealed plastic bag and opens the sealed bottles – they have a red ring seal. Afterwards they put a new seal on the bottles.
- She agreed that sometimes the athletes were unaccompanied whilst waiting to be tested on that day, as Marcos was looking for other athletes.

She was made available on 8 August for the Athlete to ask her any questions and also to respond to the Athlete's evidence about taking the receptacle out of the trash can.

She said this was impossible and it did not happen. She could not take something out of the trash can and use it. She would only use the receptacle to test the specific gravity.

Submissions from the Athlete

The Panel understands the Athlete's case to amount to the following points:

1. The International Standards were not fully respected:
 - Article 5.4.1 (d) (i) – the DCO did not ensure that the Athlete was informed of her right to have a representative accompany her in accordance with Article 6.3.3 (a)
 - Article 8.1 and 8.3.1 – All samples collected at the Doping Control Station are securely stored prior to their dispatch from the Doping Control Station, each sample collected should be stored in a manner that protects its integrity, identity and security prior to transport from the Doping Control Station – here they were not, as they were left unattended in the room when the DCO was absent with a female athlete in the bathroom.
2. She did not take stanozolol. She cannot explain how it was in the sample, except that the urine Sandra Soldan took out of the trash can might have been someone else's urine.

The Panel's Decision on the Merits

1. An anti-doping rule violation has been established by the presence of a prohibited substance (stanozolol) in the sample provided by the Athlete, in accordance with Article 2.1 of the FISA Anti-Doping Bye-Laws.
2. The Athlete cannot say how the substance came to be in her urine. She denies taking such a substance. Her explanation is that it may have been someone else's urine.
3. She refers to departures from the International Standard for Testing – in particular that the collection vessels, sample kits, and presumably samples were left unattended in an unlocked room when the DCO was accompanying female athletes to the bathroom during that morning, and that at least one person (unidentified) went into the room at some time.
4. The Panel is of the opinion that the evidence of the Athlete, of Carolina de Carvalho Corado, of Sophia Camara and of the DCO herself establishes that there were significant departures from the International Standard for testing. In particular, the failure to notify the athlete of the right to be accompanied to the doping control station, and the apparent lack of security of the doping control station when the DCO was out of the room. (There were other possible departures which are not relevant to this Athlete's case, for example, the absence of a properly authorised chaperone for the male athletes).
5. Under Article 3.2.3 of the FISA Anti-Doping Bye-Laws, "*Departures from any International Standardwhich did not cause an Adverse Analytical Findingshall not invalidate such evidence or results. If the Rower.....establishes a departure from an.....International Standard.....which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding, then FISA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.....*"
6. This requires the Panel to decide whether the departures which it has accepted to have occurred, could reasonably have caused the Athlete's sample to contain stanozolol.
7. The Panel is satisfied that the requirements relating to the sealing of the samples etc have been met, and the evidence of the Athlete does not establish anything to the

contrary to the comfortable satisfaction of the Panel. But the Panel also considers that the evidence establishes that there were times when the sample kits, and possibly the samples were unattended in the doping control and the possibility of tampering is theoretically open.

8. However, the Panel does not consider that the Athlete has established that the departures from the International Standard could reasonably have caused the positive test, even if there is a theoretical possibility of interference with the samples. It is noted that this was not specifically submitted by the Athlete as a possible cause of the adverse analytical finding, but the Panel infers from the evidence provided by the Athlete and other athletes that there is some unstated allegation that this might have had some connection to the adverse analytical finding.
9. The Panel relies on the reasoning to be found in the case CAS 2013/A/3112 *World Anti-Doping Agency v Lada Chernova & Russian Anti-Doping Agency*, paragraphs 85 and 86:
“the Panel emphasizes that the current wording of Article 3.2.1 of the WADC refers to the standard of reasonableness when establishing a correlation between the departure from the rules of the ISL and an adverse analytical finding..... This should be contrasted with the previous wording of the Article 3.2.1 contained in the WADC 2003, which preceded the adoption of the WADC in 2009 “The Athlete may rebut this presumption by establishing that a departure from the International Standard occurred” Therefore, the Panel deems that a mere reference to a departure from the ISL insufficient, in the absence of a credible link of such departure to a resulting Adverse Analytical Finding. In other words, in order for an athlete to meet his/her burden and thus effectively shift the burden to an anti-doping organization, the athlete must establish, on the balance of probabilities, (i) that there is a specific (not hypothetical) departure from the ISL; and (ii) that such departure could have reasonably, and thus credibly, caused a misreading of the analysis.”

Whilst the case cited is referring to the International Standard for Laboratories, and to the suggestion of a departure causing a misreading of an analysis in that case, the same principle of the departure reasonably and thus credibly causing the adverse analytical finding should be applied in the present case; that is the need for there to be a credible link between the departure and the positive test.

The Panel has also considered the case of CAS 2014/A/3487 *Veronica Campbell-Brown v JAAA and IAAF* where departures from the International Standard for Testing were relied upon to challenge an adverse analytical finding. In that case the athlete raised the possibility of the sample having been tampered with or having been subject to environmental contamination, due to the departures from the International Standard for Testing. In that case the panel there, in considering the equivalent regulation to Article 3.2.3 in this case concluded in paragraph 155 that the Article *“requires a shift of the burden of proof whenever an athlete establishes that it could be reasonable to conclude that the International Standard Testing departure could have caused the adverse analytical finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the International Standard Testing departure and the presence of a prohibited substance in the athlete’s sample. For those purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible.”* and in paragraph 157 that *“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 the 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 International Standard for Testing.”

The panel in that case went on to consider the question of possible tampering, and found that there was no evidence to establish tampering. The findings it made are equally apt in this case. The panel concluded at paragraph 168 *“any attempt to spike the Athlete’s sample in the doping control room would have required exceptional skill, planning and opportunity, and would have been fraught with risk.”* The panel concluded: *“there is no evidence before it to suggest any individual (either identified or unidentified) was behaving suspiciously in the doping control area. Nor is there evidence that any individual (either identified or unidentified) may have had the skill, equipment, opportunity or indeed the motive to spike the Athlete’s sample during the short window of time between the collection of her first and second urine samples”* in that case.

It is even more the case here that tampering is not plausible, because of the fact that the sample was never both un-sealed and unattended at any relevant time.

10. In our view, given that the samples were appropriately sealed, on the evidence, when the Athlete left the room, and there is no suggestion they were not sealed or appeared to have been tampered with when they reached the laboratory for analysis, given that both the A sample and the B sample tested positive, and given that there is no evidence of tampering or likely tampering when the unidentified athlete entered the unattended Doping Control Station, the Panel is comfortably satisfied that there is no credible link between the departures from the International Standard that have been established and the adverse analytical finding.
11. The panel was concerned by the conflicting evidence from the athlete and the DCO about the receptacle being placed in the bin and subsequently used to complete the B sample and tested for specific gravity. On this point in the Athlete’s evidence she said this was the first time she had been tested and was therefore unfamiliar with the process causing her to place the receptacle in the bin prior to filling the B sample in the absence of instructions from the DCO. The DCO was very clear, and adamant, that this did not happen. The panel found the DCO a more convincing witness on this point where the Athlete’s memory appeared unclear from her evidence. In general terms the Panel found the DCO to be a credible witness. She readily admitted departures from the International Standard for Testing, and where her evidence and that of the Athlete differed, the Panel preferred the evidence of the DCO.

Also the similarity of the A and B samples, including the positive result when analysed makes the panel comfortably satisfied that they are from the same athlete, and that the test was therefore conducted satisfactorily as recounted by the DCO.

12. In the circumstances, the Panel is comfortably satisfied that the anti-doping rule violation is established, and the period of ineligibility of four years, set out in Article 10.2.1 should apply. The substance involved is not a specified substance and the Athlete has failed to establish on the balance of probabilities that the anti-doping rule was not intentional.
13. Article 10.5, relating to “no significant fault or negligence” does not apply in this case where the Athlete has not adduced any evidence beyond speculation of how the prohibited substance entered her body.

FOR THESE REASONS

The FISA Doping Hearing Panel finds:

1. The period of ineligibility is four years, to commence from the date of the testing, 28 May 2015.
2. This award is rendered without costs.

Rio de Janeiro, Brazil, 8 August 2015

For the FISA Doping Hearing Panel:

John Boulton

Mikio Hiura

Mike Williams