APPEAL HEARING
Before
THE JAMAICA ANTI-DOPING APPEALS TRIBUNAL
between
DOMINIQUE BLAKE **Appellant**
and
JAMAICA ANTI-DOPING COMMISSION **Respondent**

Mr. Patrick Foster, Q.C, Ms. Catherine Minto and
Ms. Stephanie Forte for the Appellant
Mr. Lackston Robinson for the Respondent
HD – 9th, 10th, 11th September 2013

1. On the 11th September 2013, the Appellate Tribunal at the conclusion of the hearing handed down its decision which was that the appeal was dismissed in respect of culpability and the period of ineligibility for 6 years. However we varied the date from when this period of ineligibility should begin. The Jamaica Anti-Doping Disciplinary Panel (DP) had ordered that time should begin to run as of the 13th June 2013. We determined that the starting date should be the 24th July 2012. We promised to put our reasons in writing and we now do so.

2. The hearing before the Disciplinary Panel was occasioned by the presence of a specified substance *Methylhexanamine* discovered in the appellant's body, subsequent to the test of her urine sample following her participation in the National Senior Championship on July 1, 2012.

3. The appellant, an elite athlete, and a graduate of Penn State University, at the commencement of the hearing before the DP admitted negligence in ingesting the specified substance. Therefore the live issues to be determined were:

    a) The period of ineligibility, and
    b) At what time should this period begin to run.

4. Tribunals concerned with alleged anti-doping violations in Jamaica must act within the regime of the Anti-Doping Rules (referred to as Articles) as set out by the Jamaica Anti-Doping Commission (JADCO). Further, the comments in the World Anti-Doping Agency (WADA) Code pertaining to the identical JADCO rules are of assistance in the decision making process. The exercise of discretion by hearing tribunals must be exercised within the narrow confines as dictated by the Rules employing the criteria therein.

5. The appellant challenges the decision of the DP on the ground that it was not in harmony with the evidence. To succeed in this endeavour the appellant must establish that there was no basis for the conclusions to which the DP arrived. We will therefore, in our reasons, be mindful of this central contention.

6. The appellant had committed an anti-doping violation in 2006. This is her second violation. Accordingly, the period of ineligibility is governed by Article 10.7 of the JADCO Rules. The appellant contends that the period of ineligibility should be between 1-4 years on the scale mandated by this Rule. This contention can only be meritorious if the appellant can establish that in respect of her second violation she should be the beneficiary of a reduced sanction. The Rules set out the prerequisite circumstances for the granting of reduced sanctions and the scope of any such reduction.

7. The appellant firstly sought to pray in aid Article 10.4. This Rule is now set out below *in extenso*:

> *"Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:*
>
> *First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.*
>
> *To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criteria considered in assessing any reduction of the period of Ineligibility."*

8. The burden is on the athlete to establish *"to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance"* with corroborative evidence to that effect. The DP in its written reasons at Article *Paragraph 31*, stated:

> *"The behaviour of the respondent from the*

evidence does not satisfy the Panel to its comfortable satisfaction that she did not intend to enhance sport performance or wish the use of a performance enhancing substance."

9. The essence of the appellant's posture before the DP was that in her preparation for the National Championship her training was very rigorous and that had taken a serious toll on her body. It was an Olympic year. Mr. Christopher Rosengrant whom she described as her "mentor" informed her of a new product named Neurocore which would alleviate the stress of her exhaustive training routine. She researched the ingredients of the product on the DPS Nutrition Website (DPS) and then went to the WADA website and was satisfied that none of the ingredients revealed on the DPS website was prohibited by WADA. She therefore felt confident in procuring and ingesting Neurocore. She had no intention of taking Neurocore to enhance her sport performance.

10. The source of the specified substance *Methylhexanamine* is Geranium. We have examined the container which held the Neurocore. This container was dark in colour. However, there was a white strip in which was stated:

    "This product contains geranium and should not be used by those concerned with athletic testing by WADA."

    The appellant claimed that she was unaware of this warning until it was brought to her attention by her present attorneys-at-law. As far as she was concerned, the product Neurocore which she ordered was different from that which she received. The product she ordered did not have any warning pertaining to geranium. The DP perhaps euphemistically found that in the face of this clear and obvious warning the appellant had turned "a blind eye" to the ingredients of Neurocore.

11. As part of the anti-doping testing, an athlete is required to fill out a Doping Control Form. The appellant omitted to disclose that she was taking Neurocore. Her explanation was that she remembered she was taking Neurocore but did not remember the name so she put Nitro because it had an "N". The DP did not believe her explanation. The DP pointed out in Paragraph 26, that her loss of memory was:

    "Quite remarkable since she had taken Neurocore the same day that she was tested and that Nitro was one of the products she was taking."

    Further in Paragraph 27 the DP noted that the appellant:

    "Did not inform Dr. Paul Wright, the Doping Control Officer of her memory loss."

We observe that there is scant similarity between the words Neurocore and Nitro. The appellant had spent quite some time researching Neurocore. She had had discussions about this product with her "mentor" Rosengrant. It is inconceivable that after all this she could not in such a short span of time not recall a simple word. Further it is more than a little curious that the appellant's stated purpose for taking Neurocore was for training yet she took it on the day of the competition to select athletes to represent Jamaica at the Olympics.

12. WADA comments on the JADCO Article 10.4 stated *inter alia* that one of the considerations in making a determination as to whether or not an athlete ingested the specified substance with the intention to enhance sport performance is

"disclosure of his or her use of the specified substance"

13. The DP found that the appellant, who they saw and heard, was not a credible witness. Further, the DP found that Rosengrant's evidence, of which it was very sceptical, did not in any way corroborate the assertion of the appellant that she did not take the specified substance to enhance her sport performance. We find that the DP was not in error in forming this view. It follows that the DP cannot be faulted when it concluded that there was no comfortable satisfaction that the appellant's ingestion of the specified substance was not intended to enhance her sport performance. We upheld the conclusion of the DP that the appellant is not entitled to a reduced sanction under Article 10.4.

14. Secondly the appellant sought to say that she was properly entitled to a reduced sanction under Article 10.5.2. This section is now set out in full hereunder:

> *"If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Code Article 2.1 (Presence of Prohibited Substance), the Athlete shall also establish how the Prohibited Substance entered their system in order to have the period of Ineligibility reduced."*

15. The WADA comments in respect of this Rule clearly indicates that for an athlete to derive benefit from this Rule such athlete would have to discharge a very onerous burden. This burden will be successfully discharged only

> *"in unique circumstances"*

and that this Rule will have

> *"an impact only where the circumstances are truly exceptional and not in the vast majority of cases."*

16. The attempt of the appellant to seek benefit from this Rule is really quite hopeless. There was the warning on the container. This is of telling effect and by itself is sufficient to dispose of her unmeritorious contention, but there is more. In rehearsing part of the evidence of the appellant, the DP noted the following at Paragraph 17:

> *"n) That on the dps website she read everything.*
>
> *o) That the dps website says that the nutrition facts are a simulation of the product, but she does not know what that means.*
>
> *p) That the dps website said that for actual nutrition label please refer to the product packaging and this meant that she should look on the label on the bottle.*
>
> *q) That if she had looked at the label she would have seen geranium.*
>
> *r) That she did not think it prudent to examine the bottle to see any warning on it.*
>
> *s) That although she had read from the WADA 2011 list that geranium is linked to methylhexanamine that was something that she had read but it would not be stored in her mind and she would not be able to just instantly recall it, because it would not be significant to anything she was taking.*
>
> *t) That she read the 2012 WADA list and the explanation of the list, but it was of no significance.*

w) That she agreed at the time of the first anti-doping rule violation to complete an online educational programme on doping and pledged to undertake further research to enhance her knowledge on doping, which she did."

This evidence underlines the appellant's want of credibility. The DP found that Article 10.5.2 did not apply as

"There are no exceptional circumstances presented in this hearing."

We unhesitatingly agree. Therefore the appellant is not entitled to a reduced sanction under this Rule.

17. It is now clear that the appellant cannot fall within the 1-4 years period under Article 10.7, as there is to be no reduced sanction under either Articles 10.4 or 10.5.2. The period of ineligibility must be between 4-6 years. This Panel sought assistance as to where in this band would be the appropriate time for ineligibility in the event that we found that, that was the applicable range. We received no help as Counsel for the appellant was of the view that the 4-6 years stipulation was irrelevant as the appellant's behaviour puts her outside that category of ineligibility. This misplaced confidence has resulted in our Panel not being addressed on possible mitigating factors as to the degree of fault on the part of the appellant. This is regrettable especially since the appellate hearing is adversarial. If there was good reason to reduce the sanction of 6 years we would do so despite the stance of the appellant. We have found none. The period of 6 years as ordered by the DP stands.

18. It is only left to determine the date from which the period of ineligibility should run. The relevant Article is 10.9 which in so far as it is relevant is in these terms:

"10.9 Commencement of Ineligibility Period

10.9.1 Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.

10.9.3 Delays Not Attributable to the Athlete or other Person.
Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the Jamaica Anti-Doping Disciplinary Panel may start the period of

Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred.

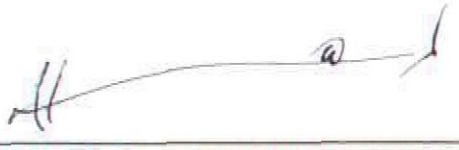
19. In dealing with this issue we will do no more than to repeat what we said in handing down our decision.

> *"9.The circumstances pertaining to the conduct of this matter was quite protracted and not in harmony with the expediency envisioned by the JADCO Rules. Whereas it is clear that the Appellant did cause delays by changes of attorneys it cannot be said that at the initiation of the process there was not significant or substantial delay not attributable to her.*
>
> *10. Accordingly, we are of the view and so state, that the period of ineligibility should run as from the date requested by the Appellant which is 24th July, 2012."*

20. We would like to express our gratitude to all the parties involved whose assistance facilitated speedy resolution.

By JAMAICA ANTI-DOPING APPEALS TRIBUNAL

1st October 2013



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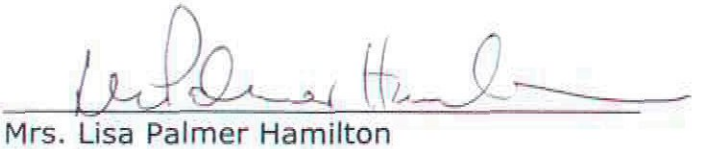
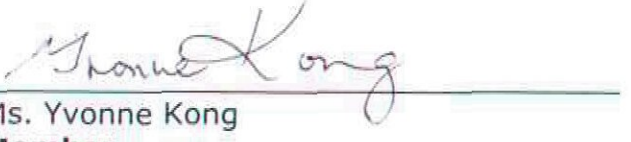
Chairman

Hon. Mr. Justice Algernon Smith (Ret'd) CD
Vice Chairman

Dr. Charlesworth Roberts
Member



Mrs. Lisa Palmer Hamilton
Member



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