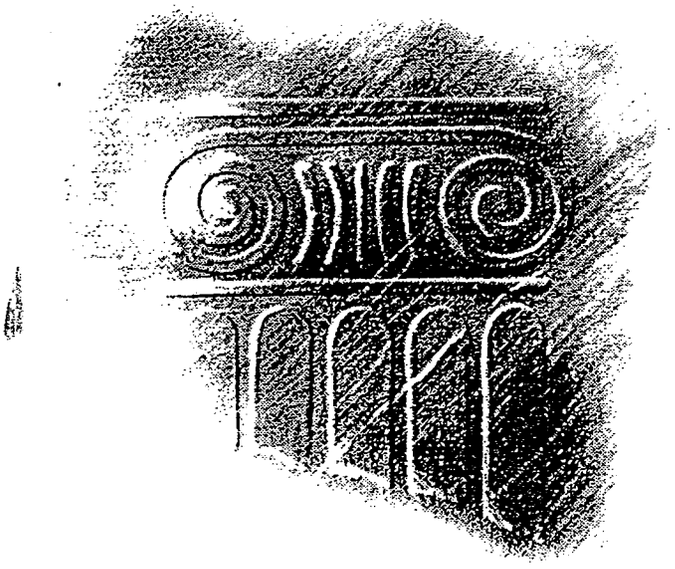
Tribunal Arbitral du Sport

Court of Arbitration for Sport



ARBITRAL AWARD

Mr Scott Alexander VOLKERS / AUS
v/
FEDERATION INTERNATIONALE DE NATATION AMATEUR (FINA) / CH

TAS 95/150 - Lausanne, 09.1996

Tribunal Arbitral du Sport
Court of Arbitration for Sport

TAS 96/150

ARBITRAL AWARD

pronounced by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Sharad **Rao**, Attorney at law, Nairobi / KEN
Arbitrators:	Mr John A: **Faylor**, Attorney at law, Frankfurt / GER
	Mr François **Carrard**, Attorney at law, Lausanne / CH
Ad hoc Clerk of Court:	Mr Markus **Staff**, Barrister at law, Geneva / CH

in the case of

Mr Scott Alexander VOLKERS / AUS
represented by Mr Peter **Baston**, Barrister at law, Brisbane / AUS

Vs

Fédération Internationale de Natation Amateur (FINA), Lausanne / CH
represented by Mr Jean-Pierre **Morand**, Attorney at law, Geneva / CH

Hearing: 28 June 1996

28, avenue de l'Elysée CH-1006 Lausanne Tél.: (41.21) 617 57 24 Fax: (41.21) 617 26 06

THE FACTS

1. The Appellant was coach to the Australian swimmer Samantha Riley when she participated in the Swimming Short Course Championships at Rio de Janeiro in Brazil (the "World Championship") between November 30, 1995 and December 3, 1996. The competition was governed by the rules of the Fédération Internationale de Natation ("FINA").

2. Ms Riley suffered from headaches prior to and during major competition which she believed were caused by tension and pre-competition nerves and she was treated with physiotherapy, massage and Panadol.

3. The Appellant was aware that Ms Riley had been suffering from headaches during the period November 21 through 28, 1995, because she had complained to him about them. Ms Riley's roommate Ms Susan O'Neill was also aware that Ms Riley was suffering from persistent headaches during both a pre-competition training camp held in Florida USA for the Australian Swimming Team (the "Team"), and the World Championships. Dr Brian Sando, the Australian Swimming Team's Doctor who was with the Team during the World Championships, was also aware that Ms Riley at that time was suffering from headaches, because the physiotherapist who was treating the problem had told him of it.

4. After dinner on the evening of November 29, 1996 Ms Riley returned to the hotel room which she was sharing with Ms O'Neill. The Appellant came to the room, asked Ms Riley how she was. She told him that she still had a headache. He asked her whether she had taken a Panadol, and Ms Riley told him that she had none left, whereupon the Appellant told her that he would get a headache tablet from his room. When the Appellant returned he gave Ms Riley a tablet, which she took. Ms Riley explains that at the time of accepting the tablet from the Appellant and taking it, she did not believe that he would give her any substance other than Panadol, and in the event that the substance was not Panadol any banned substance at all.

5. The Appellant fetched the tablet from his room. He explains that he found a single tablet in a foil strip which displayed no writing because age had rendered it illegible. He recalls however, that the tablet bore the brand name Di Gesic which some years earlier had been given to his wife. He had found them to be an effective treatment for headaches in the past. He says that he never entertained the thought that the tablet was anything other than a headache tablet similar to Panadol, nor that it was a narcotic analgesic or a banned substance.

6. Ms Riley competed in the World Championships on December 1 and 2, 1995 and on both occasions A and B samples of urine were taken from her by FINA to test for banned substances.

7. FINA's tests found a trace of propoxyphene metabolite in the A sample collected on December 1, 1995. Propoxyphene metabolite is metabolite produced from the ingestion of dextropropoxyphene or its derivatives. Dextropropoxyphene is a banned substance under FINA Guidelines for Doping Control (the "Guidelines") and the IOC Medical Code.

8. Upon being informed that Ms Riley has tested positive for a banned substance the Appellant was put on enquiry and discovered from a pharmacist that Dextropropoxyphene is present in drugs such as "Di Gesic", which is taken to mean that propoxyphene metabolite would be detected in the body of someone who had recently ingested "Di Gesic". The results of FINA's tests were accepted without dispute by the Appellant.

9. In accordance with FINA's Rules the FINA Executive considered Ms Riley's and the Appellant's case at a meeting in Berlin, Germany on February 9, 1996, where the Appellant did not appear, and was not represented although a written submission was made on his behalf. The FINA Executive gave its decision in the Appellant's case on February 20, 1996 which was transmitted to the Appellant in a facsimile transmission to him from FINA's Honorary Secretary, Mr Gunnar Werner:

> *"Please be informed that the FINA Executive, in a meeting held on 20 February 1996, considered the facts related to Miss Samantha Riley's positive*

doping test for propoxyphene metabolite, your statement from 30 January 1996, and your hearing submission of 20 February 1996.

In these written statements, you admitted giving Miss Riley the "Di Gesic" narcotic analgesic pill which caused her positive test, and consequently, the FINA Executive, in accordance with FINA Rule MED 4.17.6, has decided to suspend you from all swimming activities for a period of two years starting from 1 December, 1995.

An appeal can be presented in accordance with FINA Rules C 10.5.1 and C 10.5.2."

10. Earlier on February 5, 1996 the Appellant's case was considered by the Disciplinary Committee of Australian Swimming **Inc.** which found that "*the breach of the doping Code was caused by the actions of Volkers (the Appellant) and that whereas he had not acted deliberately, that he had been reckless.*" He was fined Australian $2,500.00.

11. In response to an enquiry made by Australian Swimming Inc. about the scope of suspension FINA replied in another facsimile message dated February 22, 1996 that the Appellant was suspended from:

"all kinds of international swimming activities."

12. Under the FINA Rules the Appellant appealed the decision of the FINA Executive to the FINA Bureau. FINA held a postal ballot in which the members of the FINA Bureau were given the opportunity to vote. The Respondent produced at the CAS hearing a copy of the memorandum ("the memorandum") sent to members of the FINA Bureau. The memorandum (dated March 20, 1996) described the facts found by the FINA Executive:

"Please be informed of the following facts on which the Executive decision was based.

1. The swimmer Samantha Riley was tested positive following doping control conducted at the II World Swimming Short Course Championships in Rio de Janeiro (BRA) on the 1st of December 1995.

The result of the "A" sample analysis was accepted by the swimmer, and she abstained from requesting the testing of the "B" sample.

2. *A hearing was conducted by the Executive in Berlin (GER) on the 9th February 1996, where the documents related to the case were submitted. Among these documents was the written statement given by Mr. Volkers, Samantha Riley's coach, in which he admitted giving Miss Riley the "Di Gesic" pill which contained the banned substance.*

Please be informed that the FINA Executive decision was taken before receiving the information regarding the penalty already imposed on Mr VOLKERS by Australian Swimming Inc as disclosed under point 7.6 of the appeal and the letter of February 5th with the decision of the disciplinary committee of ASI".

13. The memorandum asked Bureau members:

"1. *Do you agree to a stay of the appeal proceeding and of the suspension until after the conclusion of the Olympic Games, Atlanta '96."* [.....: yes, no, abstain].

2. *Do you give your approval to the FINA Executive decision to suspend Scott Volkers for two years in accordance with FINA Rule MED 4.17.6 starting 1 December 1995 and ending 13 December 1997.* [.....: yes, no, abstain].

3. *Do you have any other suggestion regarding the sanction?"*

No evidence was given about how the information collected in answers to the memorandum was evaluated by FINA.

14. The Appellant was informed of the decision of the FINA Bureau in a letter written to him by FINA's Mr Werner, dated April 26, 1996:

"Following your appeal addressed to the FINA Bureau regarding the decision by the FINA Executive on February 20, 1996, to suspend you for a period of two years starting from December 1st, 1995, according to FINA Rule MED

4.17.6; please be informed that a mail vote has been conducted and the FINA Bureau has decided to reduce your suspension to a period of one year starting on December 1st 1995."

15. Some further insight into FINA's reasoning is provided by an article appearing in the FINA circular "Fina News" headed "Summary of Doping Cases - March 1995 - April 1996" dated April 26, 1996:

> *"During the II FINA World Swimming Short Course Championships in Rio de Janeiro (BRA) held from 30 November - 3 December 1995. Samantha Riley (AUS) tested positive for Propoxyphene metabolite, a narcotic banned substance on the IOC list of banned substances. After having considered all the documents related to the case and the hearing, the FINA Executive found that Miss Riley has violated FINA Rules MED 4.3 and MED 4.17.4.*
>
> *However, considering that the urine sample showed the presence of a very low amount of the banned substance, that the presence of the proscribed agent had no potential to enhance her performance or to give her an unfair advantage, and that the analysis of the sample from Miss Riley given on 2 December 1995 (the day after) proved to be negative, which correspond* [sic] *to the facts presented at the hearing and Miss Riley's admittance of those facts, the FINA Executive decided to sanction her with a strong warning, as the consequences of any other decision would not be in proportion to the fault committed by the swimmer.*
>
> *Nevertheless, it was ascertained that the fault was the responsibility of the coach, who admitted having given her the tablet in question without taking care beforehand to consult the doctor of the Australian delegation who was accommodated on the same premises.*
>
> *For this reason, the Executive decided to suspend the coach Scott Volkers for two years. However, on appeal by Mr Volkers, the FINA Bureau changed the suspension to one year in a mail vote concluded on 23 April 1996."*

16. On May 16, 1996 the Appellant lodged an appeal in the Oceania registry of the Court of Arbitration for Sport, which was subsequently amended on May 25, 1996.

THE PROCEEDINGS

Relief Requested

17. In his Amended Application to the Appeals Division of the Court of Arbitration for Sport ("CAS") the Appellant requested relief from the decision of the Respondent, FINA so that:

(1) the finding of guilt and the penalty be set aside (as being contrary to law);

(2) alternatively, the penalty be reduced to a reasonable or nominal period (as being harsh, excessive and unreasonable in the circumstances of the breach of FINA's Rule 4.17.6).

18. The Appellant further requested CAS to stay the decision appealed from and that a decision be rendered before July 1, 1996 to enable him to participate in the Olympic Games to be held in Atlanta, Georgia. The application for a stay was dismissed by the President of the Appeals Arbitration Division on the grounds stated in his ruling dated June 3, 1996.

Jurisdiction

19. Both parties confirmed that CAS had jurisdiction to hear the appeal.

Applicable Law

20. At paragraph 7 of Order for Procedure Number 1, dated June 17, 1996 in accordance with Rule 58 of the Code of Sports-Related Arbitration (the "Code"), the Panel recorded its intention to decide the dispute pursuant to the applicable regulations and rules of law chosen by the parties, or in the absence of such a choice pursuant to Swiss law. Neither party made a specific submission on this matter. The parties pleadings concentrated upon the interpretation of the relevant FINA Rules. Counsel for FINA

cited Swiss law; whereas counsel for the Appellant cited no specific law although he referred, in oral argument, to general principles of Australian law, which principles had been argued by the Appellant before FINA Bureau and the FINA Executive. To the extent that Swiss law was invoked in argument by the Respondent the Panel was not invited to treat it as an absolute standard. No issue of conflict arose and the Panel found it possible and appropriate to resolve the dispute in accordance with the rules of FINA, and in accordance with general principles of law.

Procedure before the Panel

21. On June 7, 1996 the President of the Panel refused an application by the Appellant that the Respondent do deliver an Answer within 10 days of the delivery of the grounds of appeal, because Rule 55 of the Code did not empower the Panel to reduce the period to less than 20 days.

22. The Respondent delivered its answer on June 20, 1996.

23. At the hearing Counsel for the Appellant applied for leave to introduce fresh evidence before the Panel comprising a further statement of the Appellant exhibiting certain letters. The application was denied because it could not be shown that the evidence could not have been obtained with reasonable diligence before the filing of the Amended Application to the Appeals Division, and no other exceptional circumstances were shown by the Appellant which would warrant its introduction. The evidence in question was therefore disregarded by the Panel in making this award.

The Parties' Contentions

I. LIABILITY

24. The first ground of the Appeal before the Court is a request that the finding of guilt be set aside (as being contrary to law). Counsel for the Appellant has argued that the Appellant must have *mens rea* that is to say a "guilty mind" in order to contravene the relevant FINA Rules. The Appellant was a non-competitor within the meaning of

FINA Rule MED 4.17.6. The Appellant argues that on a plain reading of the FINA Rules, Rule MED 4.17.6 must be read in isolation from the other rules, that is, disjunctively. The Appellant's contention that in order to violate this rule a "guilty mind" is necessary rests upon a disjunctive reading. The Respondent on the other hand contends that Rule MED 4.1; 4.3; and 4.17.6 must be read in conjunction with each other (Answer Brief p. 12) and that a coach who distributes a banned substance to a competitor is guilty of a doping offence.

25. The relevant sections are as follows:

4.1 *"Doping is strictly forbidden and can be defined as the use, or distribution to a competitor, of any banned substance or procedure defined by FINA."*

4.3 *"The identification of a banned substance and/or any of its metabolites in a competitor's urine or blood sample will constitute an offense, and the offender shall be sanctioned. Evidence of blood doping, pharmacological, chemical, or physical manipulation of the urine or blood sample is also an offense which shall be sanctioned."*

4.17.6 *"If a person, including a coach, trainer, or doctor, is found to have helped or advised a competitor in misuse, or is in knowledge of such misuse without reporting it to FINA, that person will be suspended up to life."*

26. The FINA decisions cited only Rule MED 4.17.6. The decisions were communicated to the Appellant in writing each time a decision was taken. The Appellant was thus on notice as to the rule relied upon by FINA. Further explanation was provided in FINA's (first) letter to Australian Swimming Inc. and the reasoning supplemented by the article in "Fina News" of April 26, 1996. The letters and the article are not explanations approaching a reasoned judgement. The Appellant complains that only in its Answer Brief does the Respondent raise Rule MED 4.1 as the legal basis of the decision affecting the Appellant.

27. Two questions arise out of this. Firstly, on a reading of the FINA Rules, is it reasonable for the Appellant to have presumed that FINA's case rested on Rule MED 4.17.6, and should Rule MED 4.17.6 in any event be read disjunctively? The Appellant raised a number of arguments in favour of a disjunctive reading. He argued that, taken in isolation, Rule MED 4.17.6 sets out both the offence and the sanction applicable, further that there are a number of other rules concerning competitors and "*those engaged in distribution*" meaning Rule MED 4.1, 4.3, 4.17.1, and 4.17.4, but that they do not concern coaches who, he argues, are not distributors. Finally, he argues that, however the FINA Rules are read, they are unclear and ought to be disregarded.

28. The Panel is of the opinion that the Appellant could not properly presume that FINA had relied on Rule MED 4.17.6, in isolation. Each section of Rule MED 4 has the common thread of "Doping Control" running through it and in the Panel's view is not exclusive of the other provisions contained in the rule. The Panel is of the opinion that Rule MED 4.17.6 must be read as such. The Respondent's conjunctive reading of the rule is therefore accepted. Whether Rule MED 14.7.6, standing alone, implies an offence which does not require a guilty mind does not, therefore, fall to be considered.

29. The Appellant concedes that a guilty mind is not required for a competitor to commit an offence for which the relevant rules are Rules MED 4.1; 4.3; 4.17.1; and 4.17.4. Nevertheless, he argues that the Appellant did not "distribute" the banned substance to Ms Riley within the meaning of Rule MED 4.1 because it implied a course of conduct distinct from an isolated act of giving (which does not require the subjective element of intent) in support of which he cites the second edition of the "Compact Oxford English Dictionary". Insofar as it concerns "distribution" therefore, Rule MED 4.1 the Appellant argues, must be ignored.

30. Further, the Appellant argues that although the FINA Rules could *prima facie* dispense with the requirement of a guilty mind, it must be done in a clear and unambiguous way, in any event particularly where the consequences of a strict liability finding are severe. It is argued that the Appellant was an accomplice with mere ancillary liability.

31. The Appellant's final point is a technical one on the construction to be placed **on** the word "misuse" in Rule MED 4.17.6. It is argued that the word "misuse", not being a term defined elsewhere in the FINA rules, must be given its natural and ordinary meaning. The Appellant argues that the "Di Gesic" was taken for a legitimate and therapeutic purpose; it was not taken for any illicit purpose; it was not taken to gain a performance enhancing effect; it was not taken to gain an unfair advantage; it was taken in conjunction with other therapy, and so the Appellant did not "help" Ms Riley to "misuse" the banned substance. However, the Panel is of the opinion the term "misuse" permits an improper usage to be encompassed by the giving of a banned substance to a competitor in breach of the rules of competition.

32. The Appellant did not deny that Ms Riley used a banned substance, nor that he caused her to use it. The Appellant's act (in giving the competitor the tablet) was the material and operative cause of the offence. The Panel is of the opinion that Rule 4.1 is wide enough to encompass the isolated act of the Appellant, even if it lacked the subjective element of intent. The offence crystallised upon:

> *"The identification of a banned substance and/or any of its metabolites in a competitor's urine or blood sample."*
> (Rule MED 4.3).

33. The Panel is of the view that each section of the FINA Rule MED 4 is independent. Rule MED 4.3 clearly eliminates the requirement of showing a "guilty mind" with regard to a competitor. The mischief the rule is designed to combat must be extended in such a way that it can effectively be combated. Rule MED 4.17.6 is such an extension. The Appellant advised Ms Riley to take the tablet which he had procured to treat her headache. That the Appellant could not have known he was advising Ms Riley to take a banned substance has no bearing on the quality of the advice given. Self evidently Rule MED 4.17.6 can be read in a number of ways, and in the Panel's view each of which fall within the ambit of the strict liability principle in Rule MED 4.3.

34. The Appellant asked the Court to have regard to its decision in USA Shooting v/UIT (TAS 94/129) in particular to paragraph 55 at page 12;

> *"The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule appliers must begin by being strict with themselves. Regulations that affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that be understood only on the basis of the de facto practice over the course of many years of a small group of insiders."*

35. The Panel agrees with that decision. Although the FINA Rules could have been drafted more precisely, the Panel is of the view that they are, nevertheless, sufficiently predictable, qualified and uncontradictory to lend themselves to the proper analysis which the Panel has made. The Panel is satisfied that a breach of Rules MED 4.1, 4.3 and 4.17.6 amounts to an offence of strict liability, and that on the basis of the facts submitted the Appellant contravened those rules. Accordingly, the Panel upholds the decisions of the FINA Executive of February 20, 1996 and the FINA Bureau of April 26, 1996 as to the Appellant's guilt.

II. THE SANCTION

36. The second ground of appeal in the Appellant's petition before the Court, is that if the appeal should fail on the first ground, then the penalty should be reduced to a reasonable or nominal period (as being harsh, excessive and unreasonable in the circumstances of the breach of FINA's Rule MED 4.17.6). The thrust of the Appellant's argument is that FINA's sentence is manifestly excessive.

37. The Respondent argues that it would be inappropriate for the CAS to review FINA's sanction which was within its discretion, and the discretion had not been misused and that it would be appropriate for the Panel to apply a test similar to that of the Swiss Supreme Court when reviewing the appropriateness of criminal sanctions determined

by competent courts of lower jurisdiction, whereby the lower court's sentence will be affirmed as long as it was made in conformity with the law, that all relevant aspects were taken into account, and that the lower court has not misused its discretionary power. In support the Respondent cites ATF 116 IV 6, 117 IV 112, 118 IV 14.

38. It is not clear what policy FINA applied in deciding the length of the Appellant's suspension, other than that it conducted a ballot in the form set out in the memorandum which was produced to the Panel at the hearing. The ballot paper alone is insufficient to reveal how FINA exercised its discretion as to the length of the suspension nor regrettably whether FINA took into account all relevant aspects.

39. It is not disputed that CAS has authority to vary the sanction. Indeed the Respondent's counsel admitted that CAS has the power to do so. In principle the Panel would be reluctant to do so, but in light of:

(i) what is stated in paragraph 38 above, and particularly whether FINA took into account all relevant aspects in exercising its discretion, and

(ii) that for the same offence the sanction imposed against Ms Samantha Riley was only "a strong warning".

The Panel feels that it can, in this instance, properly intervene with the sanction imposed. The Respondent has urged that consistency in sentencing policy can be achieved only by FINA. This approach the Panel feels can be commended for the future, but is not sustained in the instant case.

40. It is accepted that the Appellant had no "guilty mind". The "Di Gesic" could not enhance Ms Riley's performance, nor in any other way give her an unfair advantage in competition. The Appellant owed Ms Riley a high duty of care because he was a coach, and as such someone in whom competitors, and in particular Ms Riley, placed considerable trust. This is illustrated by Ms Riley's statement in which she says that she would not have taken medication without first satisfying herself that it was not a banned substance, from anyone but the Appellant, or Dr Brian Sando. The Appellant

took the tablet from an old unmarked packet believing it to be a mild drug which was good for relieving headaches; he could easily have contacted Dr Sando who was staying in the team hotel. No explanation has been offered as to why he did not do so. The failure to contact the medical officer to make sure that the tablet to be administered contained no banned substance is a lamentable aspect of the Appellant's conduct, the likely consequence of which he should have foreseen. His conduct fell far below the standard of care and vigilance required of him in his professional duty as a swimming coach.

41. Fortunately, the tablet which was administered was not such as to enhance Ms Riley's performance or otherwise give her an unfair advantage. It is accepted the Appellant did not believe that the substance in the tablet would give Ms Riley an unfair advantage in competition. The Appellant reasonably believed that a single tablet, of whatever the substance was which he gave to Ms Riley, would not have any impact on her competitive abilities - other than to relieve her headache.

42. The Appellant in mitigation of the sanction pleaded also that he is a young man of thirty-seven whose livelihood depends on his ability to coach swimmers for international swimming events and that he had fully co-operated in FINA's investigation into the events leading to Ms Riley's positive test.

43. It has been argued that the only true retribution and effective warning to others in the sport of swimming, is to suspend the Appellant for such a period that he cannot compete in the Olympic Games in Atlanta in 1996. The Panel takes into account that the effect of the suspension imposed has been to impede the Appellant in his career by disqualifying him from taking part in international events for almost seven months, that his negligence has damaged his international reputation and the shadow of the finding will continue to hang over him for the remainder of his career. Not only did the Appellant damage his own career by his action, but he also endangered the careers of those in his charge. The Appellant must bear the stigma of a sanction for violating the doping rules, whereas hitherto he has had an unblemished professional reputation he will never again be able to hold himself out as having such.

44. The Panel considers that the Appellant has been properly sanctioned by suspension. However, taking into account the special facts of this case, in particular the state of mind FINA found Mr Volkers to have had, the mitigation which has been put forward on his behalf and the disparity in the sanctions imposed against Samantha Riley and the Appellant, the Panel is of the view that the Appellant's suspension be commuted to seven months ending on June 30, 1996. It is so decided.

* * * * *

COSTS

45. The appeal has been successful in part only, as to sanction, which was reduced because of very special circumstances. In the event, the Panel makes no award as to costs.

* * * * *

Tribunal Arbitral du Sport
Court of Arbitration for Sport

DECISION

I. The Panel upholds the decisions of the FINA Executive of February 20, 1996 and the FINA Bureau of April 26, 1996 as to the issue of Mr Volkers' guilt.

II. The Appeal by Mr Volkers is upheld in part, as to sanction. Accordingly Mr Volkers' suspension shall be commuted to a period of seven months ending on June 30, 1996.

III. The Panel makes no award as to costs.

Done in Lausanne, September, 1996)

THE COURT OF ARBITRATION OF SPORT

Mr Sharad **Rao**
President

Mr John A. **Faylor**
Arbitrator

Mr. François **Carrard**
Arbitrator

Mr. Marcus **Staff**
Ad hoc Clerk of Court

Tribunal Arbitral du Sport
Court of Arbitration for Sport

TAS 96/150 Volkers/FINA

Summary of the Arbitral Award of the CAS of June 28, 1996

On February 20, 1996 the FINA Executive suspended Mr. Scott Alexander Volkers from all swimming activities for a period of two years commencing on December 1, 1995 which upon Mr. Volkers' appeal to the FINA Bureau was reduced on April 26, 1996 to one year. Miss Samantha Riley, a swimmer coached by Mr. Volkers, tested positive for the prohibited substance propoxyphene metabolite in a doping test conducted after the World Swimming Short Course Championships held in Rio de Janeiro, in November and December 1995. The suspension was imposed on findings made as to how Miss Riley came to have the prohibited substance in her body. Mr. Volkers admitted having given a di-gesic pill to her in circumstances which the FINA Executive held to amount to negligence.

On May 16, 1996 Mr. Volkers appealed FINA's decisions to the Court of Arbitration for Sport (CAS). The CAS affirms FINA's findings as to the appellant's guilt and the sanction imposed taking into account all the circumstances in which he committed the offence. The CAS considers that infractions of the FINA's rules, such as that of Mr. Volkers, must be met with adequate sanctions to punish the offender, and to discourage others. Mr. Volkers' conduct fell far below the standard of care and vigilance required of him in his professional duty as a swimming coach.

The effect of Mr. Volkers' suspension has been to impede him in his career by disqualifying him from taking part in international events for almost seven months. Mr. Volkers' negligence has damaged his international reputation and the shadow of the finding will continue to hang over him for the remainder of his career. Not only did Mr. Volkers damage his own career by his actions but also endangered the careers of those in his charge.

Propoxyphene metabolite is not considered to enhance the performance of athletes and Mr. Volkers was found to have administered it to Miss Riley without actual knowledge of what he was doing. Mr. Volkers was strictly liable for the offence he committed. Upon being asked to explain the facts of the matter Mr. Volkers readily admitted that he had given the banned substance to Miss Riley, albeit mistakenly. Until the FINA's findings Mr. Volkers was a man with an impeccable professional reputation.

The CAS considers that Mr. Volkers has been properly sanctioned by suspension, however taking into account the special facts of this case, in particular the state of mind FINA found Mr. Volkers to have had, and the mitigation which has been put forward on his behalf, it has been decided the suspension shall be commuted to seven months ending on June 30, 1996. The shortening of Mr. Volkers' suspension detracts no liability from him.

Mr. Volkers' appeal has been successful only in part, as to sentence, which has been reduced because of very special circumstances. In the event the CAS makes no award as to costs.