



A REVIEW OF CAS 2018/A/5546 JOSÉ PAOLO GUERRERO V. FIFA AND CAS 2018/A/5571 WADA V. FIFA & JOSÉ PAOLO GUERRERO (CONSOLIDATED)



INTRODUCTION

The need to have a level playing ground for all athletes cannot be overemphasized. This has led to the creation of rules and codes to regulate players and guard against the intake of substances that may one way or the other enhance the performance or even affect the overall health of the players. Whether it is an issue of strict liability where a player is tested and found to have prohibited substance is the crux of this review. To what extent is a player's liability where prohibited substances are found in his body in circumstances that seem not to have been within his control?

FACTS OF THE CASE


José Paolo Guerrero (Guerrero) is the captain of the Peruvian National Team. The team, in preparation for the Russia 2018 world cup competition had a match against the Argentinian National team. The match was keenly contested as expected. This would be Peru's chance to qualify for the world cup competition since 1982 when it last featured in the number one football competition. After the match, Guerrero was made to undergo an in-competition Anti-Doping control to ascertain whether he had in his system, any substance prohibited by the football regulatory agencies. The analysis of the sample revealed the presence of cocaine metabolite benzoylecgonine ("BZE"), a prohibited substance.

On 3 November 2017, Mr. Guerrero received a letter from the FIFA Medical and Antidoping Department dated 2 November 2017 – through his National Association –, informing him about the alleged presence of BZE in his urine sample. On 8 December 2017, the FIFA Disciplinary Committee suspended him for a period of one (1) year. Aggrieved with the Disciplinary Committee's decision, he appealed to the FIFA Appeal Committee. On 20 December 2017, the FIFA Appeal Committee reduced the suspension period to six (6) months.

Still aggrieved, Guerrero appealed to the Court of Arbitration for Sports (CAS). His submission basically was that because he reasonably assumed that only food and drinks compliant with strict team food and beverage protocols would be served in the Visitors' room, he bore no fault or negligence and as such, going by the provisions of Article 21 of the FIFA Anti-Doping Regulation (ADR), he should not be suspended.

On its part, FIFA basically submitted that Guerrero bore some fault or negligence as and for the reasons found by the FIFA Disciplinary Committee and Appeal Committee, given that he could have done more to check on the tea he drank in the Visitors' room.

The World Anti-Doping Agency (WADA) also applied to be made a party to the appeal as an interested party. Its action against Guerrero and FIFA was, on its application,



consolidated with the main appeal. WADA's submission basically was that Guerrero must be made to serve the entire suspension period of 2 years as provided for under the Anti-Doping Rules because, while he had established that the use of the prohibited substance was both out-of-competition and unrelated to sport performance, he has not presented

concrete evidence to show that the tea he consumed in the days before the doping control

in fact, contained coca leaves or were in fact contaminated. In other words, it was possible that the prohibited substance could have entered his body through the conscious intake of such substance before he entered the Visitor's room. Alternatively, if the Panel found that Guerrero had met his burden to establish the origin of the prohibited substance WADA would accept that No Significant Fault or Negligence (NSFN) applies, but in view of the clear shortcomings in his diligence, the level of fault should be at the higher end of the prescribed spectrum and that in such instance, suspension for a period of twenty two months would be appropriate.

The court analyzed the submissions of parties and delivered its judgement, thus;

FINDING/DECISION

In delivering its judgment, the CAS while dismissing the appellant's appeal and partially upholding WADA's cross appeal, found that for it to properly determine the matter, it must set out three issues, viz- the source of the prohibited substance, the level of fault on the part of Guerrero and the proportionality of suspending the player viz-a-viz his past track records. It therefore held as follows:

1. On the first issue of source, The tribunal held that it is for an athlete to establish the source of the prohibited substance, not for the anti-doping organization to prove an alternative source to that contended for by the athlete and the standard of proof is on the balance of probabilities. Also, that in the light of WADA's acceptance that Mr. Guerrero's ingestion of the prohibited substance was used out-of-competition¹ in a context unrelated to sports performance, the maximum period of ineligibility to which he would be liable is two years. It further held that in order to establish the origin of a prohibited substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation.
2. On the issue of fault, the tribunal held that if the substance is found in the player's body and the source is known, the player must show that there was no fault on his part in allowing the prohibited substance into his body. This fault extends to negligence and his failure to exercise reasonable care as an athlete who knows or ought to know that certain substance must not be allowed to get into his body. According to Article 19 of the FIFA ADR (fault) provides:

¹ *Out-of-competition testing is any such testing of an athlete not in competition, or in any way associated with the athlete's immediate participation in an event or match.*



“Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player or other Person’s degree of Fault include, for example, the Player’s or other Person’s experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player’s or other Person’s degree of Fault, the circumstances considered must be specific and relevant to explain the Player’s or other Person’s departure from the expected standard of behaviour.”

The tribunal further held that whilst the submission of Guerrero that he reasonably believed that the necessary protocol to check the menu was in place may be reasonable enough to exclude him from fault, he however would have, as an experienced player, taken further steps to ask questions and confirm whether the tea he drank was indeed safe for consumption. The tribunal further held that there were a number of ways in which Guerrero could, instead of relying on assumptions, have discharged his primary personal duty as an athlete to ensure that no prohibited substance entered his body. He could have inquired as to what protocols operated and where in the hotel. He could have asked specifically what teabags had been put in the jug or jugs. He could have insisted on having the bags brought to him so that he could scrutinize the label and himself carry out or at least supervise the infusion of the tea. The tribunal further held that the No Fault or Negligence principle applies only in ‘exceptional circumstances’ and that such exceptions occur where the player has shown that he exercised ‘utmost caution’ to avoid doping.

In concluding on that point, the tribunal held that Guerrero’s belief, borne of long experience of the artificially cocooned life of an international footballer, that the team officials would, as had been the case in the past, ensured the safety of any food or drink served to the players in designated areas, separate from the main body of the hotel, was far from unreasonable and although that does not entirely remove liability from the player, it will be reckoned in determining the suspension period that will be meted on the player.

3. On the issue of proportionality, the tribunal held that although FIFA from the appellant’s perspective has set out points that should be considered by the tribunal to accept the six (6) months sanction as an appropriate period for the sanction, it would lead to creating a situation of uncertainty if every explanation given as to why there should be a reduced liability is accepted by the Tribunal. FIFA, from the appellant’s perspective, had asked the court to, amongst other things, consider the fact that the appellant has a clean record, that the substance found in his body was just a small quantity of BZE which would, indeed, not have enhanced his performance, etc. The court further held that to allow proportionality further to lower the period of suspension to be below one year would make a nonsense of the prescribed minimum. In view of the above, the Panel concluded that the appropriate sanction for Guerrero is a period of ineligibility of 14 months from



the date of the Award less, as all parties agree, the 6 months of suspension already served.

LEGAL COMMENTARY/REVIEW OF THE DECISION

Generally, certain substances are prohibited from been taken by athletes². This is to ensure that there is fair play and also to ensure that the players are healthy. The Tribunal seemed to have applied the doctrine of strict liability which inputs liability on the accused whether or not he is at fault. It is our considered view that where a player is able to show and it is sufficiently seen from the surrounding circumstances that he was not at fault in allowing the prohibited substance into his body, there should be no suspension³. This is particularly in circumstances where, as in the instant case, the player believed and has a reason to reasonably believe that the nutritionist has taken care of the task of ascertaining the condition of the drinks that the players consumed. It would be unrealistic, we submit, for the player to personally examine all the drinks and food he consumes when there is a nutritionist already assigned by the Peruvian National team to do so. The decision of the tribunal appears to suggest that every athlete must engage in some sort of forensic analysis of every substance it ingests into his body. Whilst some beverages may well have some of the ingredients of the banned substances boldly written on the labels, it is doubtful whether such a scenario can apply to a teabag. To be very certain of the substances used in producing the teabags may well require a phone call and an opinion of the athlete's personal nutritionist; a luxury the athlete may not afford. Indeed, the insinuation that the athlete must scrutinize every substance it ingests into his body even in the course of prosecuting a national assignment is tantamount to stretching the argument on strict liability too far.

Secondly, it would be appropriate to distinguish between 'No Fault or Negligence (NFN)'⁴ and 'No Significant Fault or Negligence (NSFN)'⁵ as envisaged under the FIFA ADR. The NFN would operate where the Tribunal finds that there is no fault at all on the part of the player. On the other hand, the NSFN would apply in situations where, although some fault can be established, the fault is of a very insignificant nature and as such the full penalty for the breach will not be meted on the player. In the instant case, the court seemed to have applied the NSFN principle when it held;

That said the Panel considers that Mr. Guerrero's fault was not significant. The Panel deems it appropriate, in assessing the correct period of ineligibility, to follow the guidance given in the seminal Cilic case founded on WADC 2009 (CAS 2013/A/3327) and suitably adapted to the WADC 2015 and, therefore, to determine the appropriate period of ineligibility based on three different categories of fault and sanction ranges.

It is submitted that considering the circumstances of the case, the more appropriate measure would have been to apply the NFN principle because the fault or negligence did

² See sections 16-18 of the FIFA ADR

³ See section 21 of the FIFA ADR

⁴ Section 42

⁵ Section 43



not flow directly from the player. In other words, the prohibited substance, got into the player's body because of the nutritionist's negligence and the representation the nutritionist had made to the player that every food or drink offer was indeed in line with the WADA/FIFA approved standard. It is quite revealing that in arriving at its conclusions, the tribunal made no passing comment on the team nutritionist nor the national team.

Thirdly, it is submitted that although the Tribunal reduced the suspension period to a period of fourteen (14) months after applying the NSFN principle⁶, the issue of proportionality should have also been considered. For example, certain points were raised for the Tribunal to consider in deciding the level of liability to be attached. Some of these points, though acknowledged by the court did not lead it to further reduce the period of suspension. In its finding the Tribunal held that;

Where, as here, a player is guilty only with NSFN a CAS Panel as any other body vested with responsibility is entitled to take account of proportionality in deciding where in the range of 1 to 2 years the period of ineligibility should be fixed;

It is our considered view that when a suspension period has been reduced upon the finding that the player is guilty only with NSFN, there should also be the possibility of a further downward review of the suspension period by applying the proportionality principle where the facts support same. In the instant case, the facts showed that the *cocaine metabolite benzoylecgonine* ("BZE") found in the player was not even significant enough to enhance performance. Also, the substance was in a tea served on the player and he had reasonable ground to believe that the contents were in line with approved specification. In fact, the track record of the player also revealed that he has never been engaged in the consumption of such prohibited substance. Furthermore, the player was an ambassador for an anti-doping brand and the substance was taken out-of-competition. A holistic view of the above would have been significant enough to further reduce the suspension period of the player.

CONCLUSION

In conclusion, whilst we agree that stiff penalty should be imposed for the indiscriminate use of prohibited substances by athletes, the principles to be applied in determining the period of the suspension must be applied in such a way as to ensure that circumstances that shows that the player is not entirely liable or could not have been entirely liable are taken into consideration. Every case must be decided on its own peculiar facts. Applying a blanket punishment on a player who had little or no control over the substances served on him in the course of prosecuting a national assignment just to make a statement, is stretching the deterrence theory of punishment too far. We await another test case that would overturn this decision. Until then, this decision hardly represents a fair application of the law.

⁶ In fact, under this principle, section 22(1)(b) makes it possible for a remand and no period of ineligibility as a minimum punishment thus; In cases where the Player or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years' Ineligibility, depending on the Player's or other Person's degree of Fault.



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