

Ain't nobody's fault: Van Snick's cocaine-sabotaged sports supplement

Charline Van Snick c. Fédération Internationale de Judo (FIJ),
TAS 2014/A/3475, July 4, 2014.



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No Fault or Negligence, Balance of probability standard, Sabotage, Social drugs, Cocaine, Substance Concentration, Quantitative data

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This case is remarkable as one of the very rare scenarios in which a CAS panel accepted to eliminate the period of *Ineligibility* based on a finding of *No Fault or Negligence* on part of the *Athlete*. It is also illustrative of the manner in which CAS panels weigh the *Athlete's* and sports organization's respective scenarios for determining the route through which a *Prohibited Substance* entered the *Athlete's* organism.

After winning the bronze medal at the World Championships, a young Belgian judoka, Charline van Snick, underwent an *In-Competition Doping Control* and tested positive for cocaine, a non-*Specified Substance* prohibited *In-Competition* only. Ms. Van Snick maintained that she had never seen, touched, let alone ingested a product containing cocaine and maintained that someone sabotaged

her by giving her favorite sports supplement “Energy Boost” a little extra boost. Relying solely upon circumstantial evidence, the panel accepted her explanation and found that the violation was committed with *No Fault or Negligence*, thus completely eliminating the associated period of *Ineligibility*.

The case

The case consisted of an appeal by the judoka of the decision made by the International Judo Federation (FIJ) to both disqualify her results from the *Competition* during which she tested positive and to impose a two year period of *Ineligibility* on her. At the outset, the panel confirmed that an anti-doping violation was established in this case, stating in particular that neither the low concentration of the metabolites of cocaine in the *Sample* nor the impossibility for this low concentration to yield performance enhancing effects were of any relevance.

Disqualification of results

Turning to the *Consequences* of the anti-doping rule violation, the panel confirmed the disqualification of all of the judoka's results during the *Competition*, including any associated medals, points or prizes. Reiterating that an anti-doping violation was confirmed in this case and noting only that the relevant rules did not contain a provision that would allow for the possibility to eliminate or attenuate sanctions imposed on the basis of Article 9 (which addresses the disqualification of results), the panel turned without further considerations to associated period of *Ineligibility*.

Period of Ineligibility

The basis for suspension or elimination of the period of *Ineligibility* that the panel considered was whether the violation was committed with *No Fault or Negligence* according to Article 10.5.1, which requires that *Athletes* establish two elements, by a balance of probability: (i) how the substance entered their organism, and (ii) the absence of *Fault or Negligence*.

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Commentary

A finding of *No Fault or Negligence* triggers the elimination of any period of *Ineligibility*. The FIJ and the *Athlete* each submitted possible explanations as to the origin of the substance, which the panel considered in turn.

FIJ's first scenario

The panel found the first explanation offered by the FIJ - that the cocaine findings were the result of voluntary consumption - very improbable. In coming to this conclusion, the panel accepted the judoka's experts' testimony that the analysis of a hair sample she provided showed that she had not been exposed to cocaine in the two-month period preceding the championships and that the concentration that was present in her hair sample was too low to indicate either a performance enhancing effect or recreational use. Further, the judoka had submitted to other *Testing* both before and after the *Competition* that were negative. The panel noted as well that she was at the time placed third in the world ranking, and thus knew she had very serious chances to obtain a medal at the championships. Therefore, knowing that cocaine is a readily detectable *Prohibited Substance*, it was very improbable that she would voluntarily consume it before or during the *Competition*, for either recreational or performance enhancing purposes.

FIJ's second scenario

The second scenario that the FIJ offered to explain the presence of cocaine, that the judoka was administering herself "micro-doses" of the substance in the context of preparing for *Competition*, was also rejected due to the same expert's testimony that the concentration from the hair sample was too low to have a performance enhancing effect.

FIJ's third scenario

A third explanation presented by the FIJ - that contamination occurred at a party or other "disreputable" location - was likewise rejected. The *Athlete's* expert posited that the substance would likely have been consumed sometime between six and twelve hours prior to the *Competition*. After receiving testimony from the judoka about her whereabouts in the 48 hours preceding the *Sample*, the panel again relied mainly

on her serious chances to medal in the *Competition* to discard this theory as improbable.

The judoka's only scenario

Finally, the panel found the sole explanation offered by the judoka - that she involuntarily ingested the substance due to sabotage - the most probable. Following notification of the positive finding, she had both a sachet of tea that she drank and her box of "Energy Boost," a powder from which she made a drink that she consumed both during and prior to the *Competition* analyzed by her expert. The analysis on the "Energy Boost" powder yielded a positive result for the presence of cocaine.

The panel highlighted the circumstances of the case that supported the sabotage theory. The panel noted that the judoka habitually prepared and consumed this energy drink during the *Competition*, that her bag, bottle and box of powder was readily identifiable. Her bag was set out in the open in the warm-up room, and was accessible by all accredited persons during the *Competition*, and the other times when the bag was left unattended. In addition, as the judoka's expert testified, since cocaine is a fine, white, odorless powder, when mixed with the Energy Boost it would be completely unnoticeable. Finally, the panel noted that the judoka was clearly convinced that an identifiable third party, a former judo instructor of hers, against whom she had already lodged a criminal complaint for harassment (and who was no longer permitted to train female athletes), was responsible for the sabotage.

Interestingly, the panel noted that due to the scant evidence presented regarding the identity of the supposed saboteur, it was not in a position to determine with certainty that an identifiable third party was the author of the sabotage.

However, based on the overall circumstances, the panel nevertheless considered the sabotage scenario the most likely to have transpired, and concluded that the judoka had sufficiently established that the substance originated from an act of sabotage, an act that the panel found – applying the comment to Article 10.5.1 – is declared under the Code as a situation of an absence of *Fault*.

The panel undertook a brief, but separate analysis to confirm as well that, in the particular matter, no *Negligence* could be held against the judoka, noting in particular that she prepared the drinks herself, using bottled water and the product she purchased herself and stored in a plastic box, after verifying that its ingredients contained no *Prohibited Substance*. Concluding that the judoka could not have reasonably anticipated the possibility that a malevolent person would open her bag and incorporate the substance into her sports drink, the panel declared the requirements of Article 10.5.1 fulfilled (that the violation was committed with *No Fault or Negligence*) and eliminated the associated period of *Ineligibility*.

Weighing scenarios for establishing the origin of the Prohibited Substance

The case provides a new illustration of a CAS panel evaluating evidence in the presence of several conflicting scenarios with respect to the manner in which the *Prohibited Substance* entered the *Athlete's* organism. Under the Code regime, this proof must be adduced by the *Athlete* by the standard of a “balance of probability.” As already stated in *Gasquet v. ITF* (CAS 2009/A/1926 + 1930) and *UCI & WADA v. Contador* (CAS 2011/A/2384 + 2386) the relevant test is whether the panel is satisfied that the *Athlete's* explanations are more likely than not, i.e. that the likelihood that the circumstances alleged occurred is equal or superior to 51%.

Since the *Contador* award made it clear that the sports organizations have an evidential burden to present alternative scenarios at least where the origin of the substance can – by the very nature of the *Athlete's* explanations – no longer be positively established (e.g. a *Contaminated Product* has been entirely consumed), CAS panels are now regularly confronted with competing versions, which they are required to weigh against each other. In the presence of multiple scenarios – e.g. four as in the present matter - the 51% percentage mark becomes unsatisfactory as an evidentiary rule for decision. In the particular matter, however, the CAS panel was able to conduct its evaluation in a rather informal manner, by finding that all scenarios other than the one presented by the *Athlete* were improbable or highly improbable, so that the *Athlete's* scenario was – the so say “default” – characterized as the “most probable” and thus meeting the balance of probability standard.

Two considerations apparently influenced the CAS panel in considering the scenarios:

1. The lack of plausibility of counter-scenarios presented by the sports organization has a favorable impact on the plausibility of the *Athlete's* scenario. This argument, while intuitively seducing, should be handled with caution in our view, since it is perfectly possible for all scenarios presented in the case to be equally unlikely.
2. The quantitative data regarding the analysis (i.e. the low concentration detected and the likely chronology of events derived therefrom), allows the CAS panel to be a bit less strict (“plus souple”) when it comes to evaluating the evidence adduced by the *Athlete* on the origin of the substance.

If this statement correctly highlights the relevance of quantitative data for the *Athlete's* defense (see final section below), the presence of such data does in our view not alter the severity of the panel's evaluation of the *Athlete's* evidence nor the standard of proof, but simply represents additional indications for backing up the *Athlete's* evidence towards meeting the required standard of proof.

Establishing No Fault or Negligence in a case of sabotage

This case is remarkable due to the relatively "light" evidentiary basis (at least as far as can be told from the award) underlying both the finding that the judoka was in fact the victim of sabotage and that the circumstances were sufficiently indicative of *No Fault or Negligence*. In previous cases, the bar has been set rather high to establish that a violation was committed with *No Fault or Negligence* (see, e.g. the WADA v. Daubney (CAS 2008/A/1515) matter, also involving cocaine sabotage).

The panel expressly acknowledged that the *Athlete* did not present sufficient evidence to adequately confirm the identity of the saboteur, yet found that the sabotage scenario was the most likely, and directly concluded that the violation was committed with *No Fault or Negligence*. The uncertainty regarding the person of the potential saboteur is particularly remarkable given that the Comment to Article 10.5.1 specifically differentiates the consequences of sabotage depending on the identity of the saboteur. The Comment states that sabotage by a member of the *Athlete's* entourage does not qualify for *No Fault or Negligence*, noting that *Athletes* "are responsible for what they ingest and for the conduct of those *Persons* to whom they entrust access to their food and drink." In this case, the saboteur was alleged to be a former member of the judoka's entourage.

One could also have expected a more in-depth assessment of whether it was reasonable for the judoka to leave her sports drink unattended knowing that it was easily identifiable and accessible to every accredited person at the *Competition*.

On the one hand, a cynic might wonder if this case sets the bar too low, opening the door for unscrupulous *Athletes* to leave their affairs unattended for large periods of time, and spike their own supplements to create a similar scenario upon which this judoka was found to have *No Fault or Negligence*. On the other hand, from a policy perspective, it is important to acknowledge that legitimate victims of sabotage are in a difficult position and will often find themselves without any direct means to establish that an act of sabotage occurred.

Here again, the lack of plausibility of a performance enhancing use of the substance would appear to have played an important role in the CAS panel's mind. Under the revised 2015 Code, a violation involving cocaine would automatically draw a (potentially career ending) four-year period of *Ineligibility*, unless the *Athlete* can establish that the violation was not intentional. It does seem desirable from a fairness and proportionality perspective to allow for a finding of sabotage in cases such as these, where the panel appears quite persuaded by the integrity of the *Athlete*, where expert evidence indicates that the *Athlete* was not a regular user of the substance, and where none of the attendant circumstances appear to speak against the possibility of sabotage. Indeed, the possibility that an *Athlete* at the top of her career would suddenly start taking cocaine in the midst of an important *Competition* does seem intuitively quite odd.

As this case represents a rare example of assessment in CAS awards of sabotage as a serious explanation for the origin of the substance, it will be interesting to see how future panels attempt to strike this balance between fairness and the need to maintain the sense that the consequences of an anti-doping rule violation are strictly administrated.

Significance of quantitative analytical data

As in previous cocaine cases – e.g. the *Gasquet*-matter – this award highlights the importance that quantitative data regarding the analytical findings can have for an *Athlete*, even where the substance at stake is a non-*Threshold Substance* subjected to the zero tolerance rule and therefore requiring only qualitative analysis (aimed at mere identification, as opposed to quantification of the substance). Obtaining at least an approximate concentration of the substance can prove essential for *Athletes* when they seek a reduced sanction for substances prohibited *In-Competition* only, whether the scenario put forward is (authorized) *Out-of-Competition Use* or inadvertent ingestion. In the particular matter, the assessment of the quantitative figures, combined with the results of the hair analysis, was unquestionably a decisive factor in winning over the panel to the judoka's scenario. The case also illustrates the value that efficient expert assistance to the *Athlete* early in the proceedings can bear for establishing the origin of the substance and eliminating or reducing the sanction.

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