



AMERICA'S CUP 32

AMERICA'S CUP JURY JURY NOTICE JN086



In the matter of the Anti-Doping Rules
and Simon Daubney

Case ACJ036
Jury Decision

29th September 2007

To: Simon Daubney, Société Nautique de Genève represented by Team Alinghi ('Alinghi'), Regatta Director, International Sailing Federation ('ISAF') and America's Cup Management ('ACM').

In the matter of the Anti-Doping Rules and Simon Daubney

Date of Anti-Doping Test: Saturday 23rd June 2007

Date of Hearing: Wednesday 26th September 2007 at 10h00 at the Royal Thames Yacht Club, London

The Hearing

[1] The hearing arose from a report received by the Jury Chairman on 13th July 2007 that Simon Daubney, a crew member of Competitor Team Alinghi had an Adverse Analytical Finding in relation to a doping control test revealing the presence of two metabolites of cocaine (Benzoilecgonina and Ecgonina Metilester) in violation of the Anti-Doping Rules of the 32nd America's Cup as amended and issued on 9th April 2006 ("Anti-Doping Rules").

[2] On 23rd June 2007 Simon Daubney along with 5 or 6 other members of his team was tested as a part of the regular testing programme that had been conducted during the course of the 32nd America's Cup in accordance with the International Standards adopted by the World Anti-Doping Agency ("WADA"). Members of the team had been tested on several occasions during the course of the Event.

[3] All crew members participating in the 32nd America's Cup were required to complete an acknowledgment and agreement as contained in Appendix 3 to the Anti-Doping Rules, whereby they agreed to be bound by all of the provisions of the International Sailing Federation ("ISAF") Anti-Doping Rules and the 32nd America's Cup Anti-Doping Rules. Simon Daubney signed such an acknowledgement and agreement on 2nd May 2006.

[4] A test of the "A" sample of urine from Simon Daubney was completed on 9th July 2007 and, after a request by Simon Daubney, a test of the "B" sample commenced on 8th August 2007.

[5] In response to questions asked by the Jury on 27th August 2007, Simon Daubney accepted that the tests carried out on his urine samples were conducted by a WADA

accredited laboratory in Madrid and also that bottle number 906104 contained the urine sample of Simon Daubney.

[6] Simon Daubney did not accept that the metabolites of cocaine that had been found in his sample were in his body at the time of the test and he contended that the custodial procedures were not in accordance with the International Standard for Laboratories.

[7] On 26th September 2007 a hearing was held at the Royal Thames Yacht Club in London. Simon Daubney was represented by legal Counsel, Howard Jacobs. Team Alinghi elected not to attend the hearing and advised the Jury accordingly.

Witnesses called by Simon Daubney

[8] Laurie Daubney, Russell Coutts, Daniel Meyers, Bradley Butterworth and Curtis Blewitt all gave evidence (Coutts and Blewitt by telephone) during the hearing as to Simon Daubney's background and character. Evidence established that Simon Daubney was a highly successful and respected professional sailor. Each had a long term and close professional and social relationship with Simon Daubney. They all testified that in their experience, Simon Daubney had never taken any kind of drug that was in breach of the Anti-Doping Rules, in particular that he had never taken cocaine, and that in their view he was of excellent character and that it was incredible and unbelievable to them that he would have knowingly taken cocaine that was the subject of the positive drug test.

[9] Bruce Burgess, a polygraph expert explained the entire polygraph system in great detail and gave evidence that he had conducted a polygraph examination on Simon Daubney on 11th September 2007. During the examination Bruce Burgess had asked 3 relevant questions, including "have you ever used cocaine?" to which Simon Daubney answered "no". The test was repeated for reliability. Bruce Burgess had no doubt that all answers were truthful and that the probability of deception was less than 0.01% which is the lowest probability on the polygraph scale used.

[10] Simon Daubney gave evidence. He stated that he had been tested for drugs many times during his long career as a competitive professional sailor (including several Olympic campaigns and six America's Cup campaigns), all of which had been negative. Like the other witnesses, he stated that as a result of him moving from Team New Zealand to Team Alinghi for the 31st America's Cup there had developed a small unruly element who opposed his move and at times he had been subjected to considerable personal harassment. He stated that in the week prior to the drug test being conducted on 23rd June 2007, he had visited one public establishment in Palma and two in Valencia where he had consumed drinks that had not been purchased by himself which could have been tampered with without his knowledge. He gave further evidence of having received in his mailbox at the Alinghi base on the day after his test, a note which stated, "I heard you were tested, how do you think you will get on? Ha Ha." He discarded the note thinking it was a practical joke being played on him. He stated that in his opinion the likely source of the positive drug test arose through the 'spiking' of a drink in these circumstances. He stated unequivocally that he had never taken cocaine or any other prohibited drug.

Other Witnesses

Anne Cappelen

[11] Anne Cappelen gave evidence by telephone that she was the Director of Anti-Doping Control Norway, who were responsible for carrying out the anti-doping tests for the 32nd America's Cup.

[12] Anne Cappelen referred to an email dated 24th September 2007 sent to the Jury Chairman which concerned the Doping Control Data Form and details of the chain of custody of the samples. She stated that there are multiple copies of the Doping Control Data Form and they are completed in various stages as the chain of custody occurs, with the yellow copy of the Form going with the test sample to the laboratory in Madrid and the red and green copies which included the completed section of the bottom of the Data Form on chain of custody being retained in Norway. She agreed that the chain of custody documentation needed to be accurate, which she believed was true in this case.

Kari Andreassen

[13] Kari Andreassen gave evidence by telephone that she was the Doping Control Officer on site in Valencia in charge of the sample taken from Simon Daubney. She advised that she had been a Doping Control Officer since 1989 and was satisfied that the Doping Control Data Form had been correctly completed and that the samples had not been interfered with whilst in her custody. It was her signature that appeared on the Doping Control Data Form as the person in charge of the control of the samples and also her signature certified that the samples had been stored in accordance with the applicable guidelines and as described therein and delivered to the courier with the assignment code.

[14] Kari Andreassen provided detailed evidence as to the security provided during the transport of the sample from Port America's Cup in Valencia to the control laboratory in Madrid. She stated that as the samples were taken on the 23rd June 2007 which was a Saturday, the DHL office which was to courier the samples to Madrid was not open on the weekend and so she was therefore required to retain the samples until Monday 25th June.

[15] Kari Andreassen stated that she and another Doping Control Officer Mr Andreassen (unrelated to her), transported the samples from Port America's Cup in Valencia in an air-conditioned rented car and travelled to La Zenia. They were accompanied by Kari Andreassen's son – also a Doping control Officer, but not involved with this mission – and his girlfriend. The samples were placed in a covered position in the car and were not visible to others. During the course of travelling in the car, the Doping Control team stopped for lunch. The vehicle was parked in the shade, locked and was observed by them over the period of approximately one and a half hours during which they had lunch. Although the car was in the shade, the temperature outside was hot and the car was warm when they returned to it. They then travelled to their rented accommodation and the samples were placed in a refrigerator in the rented house. That evening they went out for dinner for several hours and the samples were left in the refrigerator in the rented house. The refrigerator was not locked. The house was locked and had a burglar alarm which was turned on. On returning to the house there was no evidence of a break-in.

Jesus Muñoz-Guerra Revilla

[16] Jesus Muñoz-Guerra Revilla gave evidence by telephone. He stated that he was the Technical Manager responsible for the laboratory control of the samples delivered to the laboratory in Madrid. He stated that he had a university degree in chemistry, that he was a qualified chemist and had 20 years experience in the area of testing for drugs.

[17] He stated that he was not present when the "A" sample was opened for testing, but that he was present when the "B" sample was opened. He knew from personal observation that the "B" sample had not been tampered with prior to being opened. He stated that there was no requirement that such urine samples be kept refrigerated and that in any event in the case of cocaine it would not affect the test result. He also stated that from observation, from testing the pH values of the samples and the fact that there were no sediments in the urine samples, it was clear to him that neither the "A" sample nor the "B" sample showed any degradation.

[18] Both samples showed metabolites of cocaine, but not cocaine itself. He stated that the Madrid laboratory analyses approximately 10,000 samples per year, of which around 10 cases per year test positive for cocaine or its metabolites. He stated that he did not have any particular expertise with regard to the effects of cocaine as a drug. In his opinion, cocaine could remain in a person's urine and be able to be identified in a test for a period of up to 6-7 days after the cocaine had been consumed.

[19] Jesus Muñoz-Guerra Revilla also stated that he could not rule out the possibility that the cocaine as tested could have been placed in a person's drink which resulted in a positive test. He also stated after a further reflection that he did not know what effect such levels of cocaine would have on people. He was satisfied that the Anti-Doping Rules had been complied with and that there was no evidence of tampering with the samples they had received at the laboratory.

Summary of Submissions on behalf of Simon Daubney

[20] Howard Jacobs submitted as follows:

- i) That the evidence given with regard to chain of custody of the samples showed that the samples had not at all times been properly kept under the possession and control of the Doping Control Officers and therefore the chain of custody had been broken and the case must be dismissed.
- ii) That in respect of the test result, the Jury could not rule out the possibility that without Simon Daubney's knowledge, cocaine had been placed in a drink that he had consumed and which had resulted in an Adverse Analytical Finding.
- iii) That the polygraph results and the comprehensive and compelling personal testimony as to the character of Simon Daubney should satisfy the Jury that he did not knowingly take cocaine.
- iv) That with reference to Article 10.5.2 of the International Standards issued by WADA and Article 8.1 of the Anti-Doping Rules, although it was impossible to prove sabotage, the evidence had established by a balance of probabilities

that sabotage was likely to have occurred resulting in Simon Daubney consuming cocaine without his knowledge. The evidence showed that Simon Daubney had not been negligent and the positive test was not caused by any fault of Simon Daubney.

Decision

Burden of Proof

[21] Article 3.1 of the Anti-Doping Rules provides as follows:

“3.1 Burdens and Standards of Proof

The hearing body shall have the burden of establishing that a Rule violation has occurred. The standard of proof shall be whether a Rule violation has been established to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Competitor’s Crew Member or other Person alleged to have committed a Rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.”

[22] The Jury accepts the submission of Mr Jacobs that such burden of proof is a multi-step process with a shifting burden of proof. The Jury considers that once the evidence on an Anti-Doping violation from the WADA accredited laboratory was introduced, a presumption existed that Simon Daubney had committed a Rule violation and that he was then entitled to rebut this presumption by a balance of probabilities.

[23] Article 3.2 of the Anti-Doping Rules provides for methods of establishing facts and presumptions. In the event that the presumption is able to be rebutted by showing a departure from the presumption that the WADA laboratory results, the Anti-Doping organization “shall have the burden to establish that such departure did not cause or affect the Adverse Analytical Finding.”

General

[24] The “chain of custody” aspects were less than perfect but the Jury is nevertheless satisfied that any shortcomings did not affect the Adverse Analytical Finding.

[25] The Jury is satisfied that an Anti-Doping Rule violation has occurred in that there was the presence of two metabolites of a prohibited substance in Simon Daubney’s bodily specimen.

[26] The Jury is completely satisfied that Simon Daubney told the truth to the Hearing Body when he stated that he had not knowingly taken cocaine or any other banned substance.

[27] Having regard to the nature and circumstances of the case, the Jury is satisfied that Simon Daubney bears no fault or negligence with regard to the presence of the two metabolites in the bodily specimen.

[28] There were no claims, nor was there any evidence of organised doping at team level by Alinghi, Simon Daubney's team. The Jury was satisfied that the Alinghi Team provided comprehensive advice and facilities to its sailors regarding anti-doping matters.

[29] In the circumstances of this case, the Jury took into consideration what would be expected of a responsible professional sailor in taking reasonable precautions to ensure that he would not take banned substances without his knowledge in today's America's Cup environment. The Jury considers that during the 32nd America's Cup, it was not reasonable to expect sailors to totally isolate themselves from public areas. In this context, the Jury is satisfied that the Adverse Analytical Finding was not caused by the negligence of Simon Daubney.

[30] The Jury has jurisdiction to assess whether Simon Daubney breached the Anti-Doping Rules and to decide if he committed any fault, but because the 32nd America's Cup has finished and there is no question of Team Alinghi being involved with organised doping, ISAF has the jurisdiction in respect of a penalty.

[31] The Jury notes that Simon Daubney voluntarily stopped competitive sailing from 13th July 2007.

[32] This decision will be delivered to: Simon Daubney, his lawyer Howard Jacobs, Société Nautique de Genève (Alinghi), the Regatta Director, America's Cup Management, and the International Sailing Federation.

[33] The decision is unanimous and there are no reporting restrictions.

Costs

[34] A separate decision on costs will be issued by the Jury after having considered Simon Daubney's and ACM's submissions on that subject.

A handwritten signature in black ink that reads "Bryan Willis". The signature is written in a cursive style with a large, sweeping initial 'B'.

Bryan Willis

America's Cup Jury:

Graham McKenzie, Henry Menin, Henry Peter, David Tillett, Bryan Willis (Chairman)