



Arbitration CAS 91/56 S. / Fédération Equestre Internationale (FEI), award of 25 June 1992

Panel: Prof. Gérard Rasquin (Luxembourg), President; Mr. Hans Ulrich Sutter (Switzerland); Mr. Reiner Klimke (Germany)

Horse doping (promazine)
Poorly sealed urine samples
Principle of the benefit of the doubt

- 1. The FEI Regulations institute a system of legal presumption. The burden of proof, which is normally incumbent upon the person alleging the guilt of a third party, is reversed: for the person responsible to have a penalty imposed upon him, it is sufficient that the analyses performed reveal the presence of a prohibited substance.**
- 2. The same FEI Regulations do not mention the possibility for the person responsible to produce conclusive evidence. However, taking into account the seriousness of the measures which may be pronounced against him and which are, moreover, akin to penalties, there is no doubt that, in application of a general principle of law, the person responsible has the right to clear himself through counter-evidence. The person responsible may also provide evidence that the sampling or analysis procedure was invalidated. In the latter case, the legal presumption of guilt on the part of the person responsible will be shifted only if the alleged fault is proved and likely to call into question the result of the analysis.**
- 3. In casu, the two jars containing the “B” urine samples to be analysed had not been closed in accordance with the provisions of the FEI Veterinary Regulations.**

The horse B., ridden by the appellant S., took part *inter alia* in two CSI-W in December 1990. It was subjected to a medicaments control at both competitions. On 2nd and 15th January 1991, the Horseracing Forensic Laboratory Ltd in Newmarket/GB (HFL), analysed the two “A” urine samples. Both were positive and contained hydroxyethylhydroxypromazine, a prohibited substance in the sense of article 1013 of the FEI Veterinary Regulations.

On 22nd and 30th January 1991, the British Equestrian Federation asked for a confirmatory analysis of the “B” samples of urine to be performed, and that this be supervised by Professor Manfred Donike, responsible for doping analyses at the Bundesinstitut für Sportwissenschaft, Institut für Biochemie, Deutsche Sporthochschule Köln.

On 12th February 1991, Professor Donike and the appellant went to the HFL in Newmarket to be present for the analysis of the “B” urine. Professor Donike noted that, at first sight, the jars containing the samples looked to be correctly sealed. However, a closer examination led him to establish that the two lengths of the wire had not been twisted around themselves before being wound around the seal. He was thus able to slide the seal, without damaging it, along the metal wire. Considering that the provisions stipulated in section III A.8 of Annex III of the FEI Veterinary Regulations had been disregarded and that respect thereof was an absolute condition of the analysis, Professor Donike refused to supervise the confirmatory analysis.

On 14th February 1991, the FEI asked the HFL to perform an analysis in any case on the “B” urine samples, which it did. On 22nd February 1991, the laboratory informed the FEI that the samples had proved positive and contained hydroxyethylhydroxypromazine.

On 3rd June 1991, the FEI Judicial Committee decided to disqualify the appellant and the horse B. from the CSI-W, to suspend the appellant for a period of six months and to order him to pay the respondent the sum of SFr. 3,000.– as a contribution towards procedural costs.

On 24th July 1991, the appellant lodged an appeal with the CAS.

The Panel heard the arguments of the parties and was able to examine the equipment for the taking of samples used by the respondent.

It being more particularly the facts of the case which were involved, the Panel accepted the evidence of Professor Donike. From it, the following essential elements emerged:

The two jars which were presented to Professor Donike on 12th February 1991 in Newmarket which contained the “B” urine samples to be analysed were both, in the same way, incorrectly sealed because the two lengths of the sealing wire had not been twisted around themselves in accordance with the FEI Veterinary Regulations. It had therefore been possible for him to slide the seal along the wire, which the appellant confirmed and which the respondent did not dispute.

Through the showing of a video brought by the witness Donike, it could be established that the airtightness of the jar was affected if its lid was unscrewed, even slightly. It was also demonstrated that the lid could be unscrewed in spite of the metal wire when it was possible to slide the incorrectly sealed seal along the wire. This operation was facilitated when the jar was small, as it was then possible to free and dispose of a greater length of wire. It was then possible to contaminate the contents of the jar by introducing a foreign liquid, and then once more sliding the seal without such manipulation being noticeable. Now, according to the evidence of Professor Donike, not contested by the respondent, the two jars examined in Newmarket on 12th February 1991 were small in size.

The appellant concluded that the decision made by the Judicial Committee of the FEI on 3rd June 1991 be quashed and that he be discharged from all punishment.

LAW

1. The competence of the CAS to hear an appeal against the decisions of the FEI Judicial Committee derives from articles 051.6.2 and 053.1 of the FEI Statutes.
2. Furthermore, the appeal fulfils the conditions laid down in the regulations and is admissible.
3. It is not disputed that the appellant is the person responsible for the horse B., in the sense of article 145 of the FEI General Regulations.
4. Article 177 paragraph 5 of the FEI General Regulations, 18th edition, in effect on 23rd July 1990, stipulate the following: *The finding on analysis of a Prohibited Substance as per the definition of Article 149, paragraph 2, will always entail the disqualification of the horse and the competitor from the event (article 177.5.1). If such results of finding on analysis may be construed as a deliberate attempt to affect the performance of the horse, or in the case of repeated offences, the penalty shall entail the suspension of the Person Responsible from 3 to 24 months. A fine of SFr. 1'000.– to SFr. 15'000.– can also be imposed (article 177.5.2). If such results of findings may not be construed as a deliberate attempt to affect the performance of the horse or if the result of such findings may be construed as the result of legitimate treatment of the horse or of one or more parts of his body, the penalty shall entail a fine of SFr. 1,000.– to SFr. 15'000.–. A suspension from 1 to 3 months may also be imposed (article 177.5.3).*

Thus Article 177.5.1 of the FEI General Regulations institutes a system of legal presumption. The burden of proof, which is normally incumbent upon the person who is alleging the guilt of a third party, is reversed: for the person responsible to have a penalty imposed upon him, it is sufficient that the analyses performed reveal the presence of a prohibited substance. The seriousness of the penalty (articles 177.5.2 or 177.5.3), but not its principle, depends on the degree of the fault committed by the person responsible: a deliberate attempt to affect the performance of the horse or not, the simple result of legitimate treatment of the horse.

This is a simple legal presumption and not an irrebutable presumption, thus a presumption which may be overturned by proof to the contrary. To be sure, the FEI General Regulations do not mention the possibility for the person responsible to produce peremptory evidence. However, taking into account the seriousness of the measures which may be pronounced against him and which are, moreover, akin to penalties, there is no doubt that, in application of a general principle of law, the person responsible has the right to clear himself through counter-evidence (proof that the presence of the prohibited substance is the result of an act of ill-will on the part of a third party or that the result of the analyses performed is wrong, for example). The person responsible may also provide evidence that the sampling or analysis procedure was invalidated in the sense that the FEI Veterinary Regulations, which establish extremely precise rules in this regard, were not respected. In the latter case, the legal presumption of guilt on the part of the person responsible will be destroyed only if the alleged fault is proved and likely to call into question the result of the analysis.

5. In the present case, the Judicial Committee of the FEI disqualified the appellant, suspended him for a period of six months and ordered him to pay the sum of SFr. 3'000.– as a contribution towards procedural costs. It therefore implicitly applied article 177.5.2 of the FEI General Regulations since only this provision allows for a suspension of this length to be imposed on the person responsible.
6. The fact that Professor Donike refused to be present for the confirmatory analysis of the “B” urine samples and that he did not therefore supervise it as provided for by article 1023.4 of the FEI Veterinary Regulations, is not likely to have called into question the result of the analyses. There is no doubt that this was positive. One could not therefore consider that this procedural error, for which the appellant, moreover, ultimately assumes the responsibility, is sufficient to destroy the legal presumption which is on the person responsible.
7. It could be established from the written proceedings and in particular the hearing of Professor Donike, that the two jars containing the “B” urine samples to be analysed had not been closed in accordance with the provisions of the FEI Veterinary Regulations: the two lengths of the closing wire had not been twisted around themselves several times as stipulated by paragraph III.8 of Annex III of these Regulations. As a result of this error, it was possible to slide the seal along the metal closing wire, and to unscrew slightly the lid of the jar and, as a result, to destroy the airtightness thereof. It is therefore not possible to exclude definitely the possibility of manipulation and thus contamination of the contents of the two jars by an external substance. On this point, doubt exists which must be to the benefit of the appellant.

Indeed, it follows, from the final paragraph of article 1024 of the Veterinary Regulations that, in the case where a confirmatory analysis is performed, for there to be cause to apply a sanction, the analysis of the “B” sample must confirm the positive result of the analysis of the “A” sample, which cannot be the case unless all the provisions of Annex III of the Veterinary Regulations have been scrupulously observed, in such a way as to eliminate any possibility of manipulation. The appeal by the appellant must therefore be upheld and the decision by the FEI Judicial Committee of 3rd June 1991 must be quashed.

The Court of Arbitration for Sport pronounces:

1. The appeal is upheld.
2. The decision of 3rd June 1991 by the Judicial Committee of the International Equestrians Federation (FEI) is quashed.
3. (...)