COURT OF ARBITRATION FOR SPORT
APPEALS DIVISION
MELBOURNE

Sevdalin Marinov — Appellant (Respondent)

AND

Australian Sports Anti-Doping Authority — Respondent (Applicant)

CAS 2007/A/1311

Appeal against the Final Award of a single arbitrator of the CAS dated 9 June 2007

Appeal – CAS sole arbitrator – anti-doping violation – application by defendant for dismissal of single arbitrator's final award – consideration of meaning of "trafficking" and purpose of word "possessing" – AWF 2002 Anti-Doping Policy cl 15.1

Marinov was found to have committed an Anti-Doping Rule violation under the 2002 Australian Weightlifting Rules (AWF) Rules before a single CAS arbitrator in June 2007. He was found to be in "possession of prohibited substances, being anabolic and androgene steroidal agents". The illegal substances, which were part of a larger cache, had been found by the police on the top shelf of a wardrobe in the bedroom he "occupied" as a bare licensee in the house of the owner. At the time of the find, the appellant had been coaching an Australian weightlifting team in Canada. The Tribunal at first instance concluded that the appellant knew that the packets were in the wardrobe, knew that they contained a prohibited substance, and that he had the power and ability to remove them or have them removed from his possession and so was possessing and holding them. The appellant contended that the Tribunal had made errors of law in regard to the legal implications of the definition of "trafficking" and the purpose of the word "possession" in the definition of "trafficking". The appellant also argued that the Tribunal had erred in finding that the appellant knew that the packets were on the top shelf, knew that they contained prohibited substances, could see the packets and knew of their contents and was therefore in possession, and could have removed them.

Held, by Kavanagh P, Winneke, and Sullivan AA, that the appeal be allowed. The Panel found that while the Tribunal had made no error in its approach to

the definition of "trafficking", it was mistaken in attributing to the appellant, by reason of his "occupation" of the room, powers of control which he did not legally or practically have. He was nothing more than a bare licensee and the Panel held that he had no right of "control" over any items in the room other than those which formed part of his own property or which he had legal possession of. To establish a case, it had to be shown that not only did the appellant know the packets contained a prohibited substance, but that they were his property or put on the shelf by him so that the requisite degree of control over the goods could be established. The respondent never established that the appellant had put the drugs on the shelf or that the drugs were his property, nor was evidence ever produced which could justify such a submission as the owner of the house had pleaded guilty to possession of the drugs.

International Cycling Union & Italian Cycling Federation v Marco Pantani CAS 2002/A/403 & 2002/A/408 distinguished.

Assuming the panel was wrong and that the appellant had "control" over the drugs, the Panel considered the lack of positive proved facts from which inferences could be drawn was such that they could not be "comfortably satisfied" that the appellant could have seen the drugs, or seen them in such a way as to be able to read the labels and know they contained prohibited substances.

Briginshaw v Briginshaw (1938) 60 CLR 336 applied; *Chapman v Cole* [2006] 15 VR 150; *Seltsam Pty Limited v McGuiness* (2000) 49 NSWLR 262; *French v Australian Sports Commission and Cycling Australia* CAS 2004/A/ 651 considered.

Appeal from the Final Award of the Tribunal before the CAS Appeals Panel allowed.

[Headnote by Andy Gibson]

CAS 2007/A/1311 Marinov v Australian Sports Anti-Doping Authority

FINAL ARBITRAL AWARD
(Save as to Costs)

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Panel

President: The Honourable Justice Tricia **Kavanagh**, Sydney, Australia

Arbitrators: The Honourable John **Winneke** QC, Melbourne, Australia
Mr Alan J. **Sullivan** QC, Sydney, Australia

Ad Hoc Clerks: Mr Tim Holden, Solicitor, Sydney, Australia
Ms Sarah Burgemeister, Solicitor, Melbourne, Australia

In the matter of:

SEVDALIN MARINOV
represented by Mr Paul J. Hayes, Barrister, Melbourne, Australia
instructed by Mr John McMullan of McMullan Solicitors, Melbourne, Australia

– Appellant –

and

AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY, Canberra, Australia
represented by Mr Anthony Nolan SC, Barrister, Melbourne, Australia
instructed by Mr Ian Fullagar and Ms Jessica Zikman of Lander & Rogers Lawyers, Melbourne, Australia

– Respondent –

Introduction

1. Sevdalin Marinov (the *Appellant*), a head coach of an Australian weightlifting team, had been under the control of the Australian Weightlifting Federation (*AWF*) when, on 5 February 2007, the Australian Sports Anti-Doping Authority (ASADA) (the *Respondent*) determined that in November 2003 the Appellant had committed an Anti-Doping Rule Violation under the 2002 AWF Rules, namely, "possession of prohibited substances, being anabolic and androgenic steroidal agents". Details of the Anti-Doping Rule Violation were entered onto the Register of Findings maintained by ASADA.

2. The AWF had elected to have its disciplinary decisions heard through the CAS Arbitration System. The Appellant appealed the decision of ASADA before Mr Henry Jolson QC sitting as a sole arbitrator for the AWF in the Ordinary Division of the Court of Arbitration for Sport (CAS) (the *Tribunal*). In the Tribunal's Final Award, published on 9 June 2007 (which incorporated two Partial Awards made by the Tribunal of 9 May 2007 and 1 May 2007), the Tribunal found the Appellant:

> 1. … has committed a doping offence contrary to clause 3.2(a) of the 2002 Australian Weightlifting Federation Anti-Doping policy by being knowingly involved in trafficking constituted by his possessing and holding, in November 2003, prohibited substances, namely anabolic and androgenic steroidal agents.
>
> 2. … is, for the period of his life, banned from selection to represent Australia in international competition, from competing in any events and competitions conducted by or under the auspices of the Australian Weightlifting Federation.
>
> 3. The period of ineligibility is to commence from 14 November 2003 the date of the offence.
>
> 4. … is to contribute the sum of $7000 towards (ASADA's) costs to be paid within 60 days of this Award unless the parties come to an arrangement for payment to be made on terms suitable to them.
>
> 5. The costs of the arbitration, to be determined by the CAS Court Office and served on the parties in due course, shall be borne by

> the parties in the following proportions: 50% of the costs by (the Appellant) and 50% of the costs by (the Respondent).
>
> 6. The Award and the annexed Partial Awards be made public."

3. The Appellant appeals the Final Award of the Tribunal before this CAS Appeals Panel which Award incorporates the Tribunal's two Partial Awards.

4. The following particulars of the alleged violation were provided to the Appellant:

> "The material particulars in the doping offence are as follows: In or about November 2003 Mr S. Marinov knowingly engaged in storing, possessing and/or holding the following prohibited substances which were located in a cupboard of the bedroom occupied by Mr S. Marinov, situated at 57 Lynette Avenue, Warrandyte, Victoria."

The substances were identified as:

(a) "androlone phenylpropionate" contained in a cardboard box labelled "DECA DURABOL … Nandrolone deconoate … 200mg/ml…" containing a vial labelled "Deca Durabol" which contained a substance in the form of a pale yellow liquid.

(b) "testosterone propionate, testosterone isocaproate, testosterone deconoate and testosterone phenylpropionate" in a cardboard box labelled "SUSTANON 250 … 10ml" containing a vial labelled "Testosterone isocaroate … 60mg … Testosterone deconoate … 100mg" containing a substance in the form of a pale yellow liquid".

(c) "stanozolol" in a cardboard box labelled "ILIUM STANABOLIC … 20ml" containing a vial labelled "Olium Stanabolic … 50mg/ml … Stanozolol" containing a substance in the form of a white cloudy liquid".

The Appeal

5. On appeal, the Appellant seeks the following relief:

(a) That the appeal be upheld.

(b) That the final award of 9 June 2007 be set aside.

(c) That the Respondent's allegation against the Appellant that he committed an Anti-Doping Rule Violation of the 2002 Australian Weightlifting Policy, made by the Respondent on 5 February 2007 and as particularised on 2 April 2007 be dismissed.

(d) That the Respondent be requested/directed to rectify the ASADA Register of finding and forthwith delete the entry made on the register on 5 February 2007, which refers to the Appellant.

(e) That the Respondent pay the Appellant's costs of the appeal and the hearing at first instance, to be determined pursuant to R64 of the *Code of Sports-related Arbitration*.

6. The parties to the Appeal agreed the evidence in the primary hearing be evidence before the Appeal Tribunal. The parties made no application to call new evidence not to cross-examine witnesses who had given evidence before the Tribunal.

7. The scope of the appeal is in accordance with Rule 57 of the CAS Code of Sports-related Arbitration which states:

> **"Scope of Panel's Review, Hearing**
>
> The panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."

8. Submissions were filed and the Appeal Tribunal heard argument in Melbourne on 1 September 2007. Following a short adjournment, at the conclusion of the hearing, the Appeal Tribunal announced that it had

decided to allow the Appeal and that it would publish its reasoned Award later. This is that reasoned Award.

Relevant Rules

9. The parties agreed in the hearing at first instance before the Tribunal and before the Appeal Tribunal that the applicable rules were those in the AWF's 2002 Anti-Doping Policy (the *Policy*). Relevant to the Appeal are the following clauses of the Policy, namely, Clause 3.2(a) and Clause 15.1. They read as follows:

> "3. WHAT IS A DOPING OFFENCE
>
> …
>
> 3.2. A person (including an athlete) commits a doping offence if:
>
> (a) the person is knowingly involved in trafficking, or
>
> (b) …
>
> 4. …
>
> 5. …
>
> 6. …
>
> …
>
> 15.1 WHAT DO THE WORDS IN THIS POLICY MEAN?
>
> A. …
>
> B. …
>
> C. …
>
> "Trafficking" means
>
> (a) manufacturing, extracting, transforming, preparing, storing, expediting, transporting, importing, transiting, offering (whether subject to payment of free of charge) distributing, selling, exchanging, brokering, obtaining in any form, prescribing, commercializing, making over, accepting, possessing, holding, buying or acquiring in any manner a prohibited substance …
>
> (b) …
>
> (c) …

> other than for personal use by a person who is not an athlete, for personal use by an athlete where the athlete has approval for therapeutic use, or in the course of a lawful exercise of professional medical, pharmaceutical or analogous activities."

Agreed Facts

10. The Appellant was born in Bulgaria in June 1968 and migrated to Australia on 3 March 1991. He won a Gold Medal for Bulgaria at the 1988 Olympics in Seoul. At the 1994 Commonwealth Games, he won Gold and two Silver Medals for Australia. He has held many European and World records in his divisions.

11. After his retirement from competition in 1996, the Appellant held a number of senior coaching positions in Australia between 2002 and 2006. These included: Australian Junior Coach for the AWF between 2003–2006; Head Coach in 2003 for the World Junior Championships and Oceania Junior Championships and Assistant Coach for the 2003 World Senior Championships and Oceania Senior Championships.

12. In 1994, the Appellant was suspended from the sport for two years for using a prohibited substance. The evidence is silent as to the circumstances of the offence or the identity of the relevant substance.

13. On 14 November 2003, three packets, each containing substances later certified to contain derivatives of prohibited substances under the Anti-Doping Policy of the AWF, were found by two members of the Victorian Police Force on the top shelf in a wardrobe in a bedroom "occupied" by the Appellant from August 2003 until sometime in November 2003. At the time the packets were discovered, the Appellant was in Canada coaching an Australian Weightlifting Team for the World Weightlifting Championships, having left Australia on or about 12 November 2003.

14. The packets were labelled:

- "Deca Durabol… Nandrolone deconoate … 200mg/ml…" and contained nandrolone deconoate a derivative of Nandrolone

- "Sustanon 250 … 10ml" and contained a vial labelled "Testosterone isocaroate … 60mg … Testosterone deconoate … 100mg".

- "Ilium Stanabolic … 20ml" contained a vial labelled "Olium Stanabolic … 50mg/ml … Stanozolol".

15. From August 2003, the Appellant, after he had separated from his wife, had used the bedroom in a house owned and occupied by Mr Keith Murphy. Mr Murphy had given permission for the Appellant to use the bedroom on the first floor of the house. Mr Marinov paid no rent or other fee in connection with the use of that bedroom.

16. On 13 November 2003, Mr Murphy's car was intercepted by police for a traffic violation and a number of illegal drugs were found in the car. Police then proceeded to search Mr Murphy's house and great quantities of other illegal substances were found, including the three packets on the top shelf of the wardrobe of the bedroom used by the Appellant.

17. Mr Murphy was charged with seven offences. Five of the charges related to the possession and trafficking of various anabolic steroids. Evidence of the contents of the three packets found in the wardrobe of the bedroom, used by Mr Marinov, were relied upon in the police prosecution against Mr Murphy. The police gave evidence in the criminal prosecution that Mr Murphy appeared to be the only one involved in the possession and trafficking of these substances. There were no fingerprints found on the three packets and no DNA tests were conducted on them. Mr Murphy pleaded guilty to possessing and trafficking of prohibited substances including those substances in the three packets after being charged in November 2003. He was given a suspended gaol sentence.

18. On 15 December 2006, ASADA first notified the Appellant of its consideration that he had "potentially committed an anti doping rule violation" some three years and one month from the time the substances were discovered in the wardrobe of the bedroom he used in Mr Murphy's house. Possessing, storing and/or holding the prohibited substances found in the three packets is a charge of "trafficking" under Clause 3.2(a) of the Policy.

The Awards of the Tribunal

First Partial Award

19. The Tribunal in its First Partial Award considered the definition of "trafficking" in Clause 15.1 and adopted the view expressed in *French v Australian Sports Commission and Cycling Australia* (CAS 2004/A/651, 11 July 2005) concluding at [24]:

> "the definition of "trafficking" is a deeming provision containing a number of component words, any one of which alone or in combination with each other disclose the offence of "trafficking" if a person has knowledge of that component. Of course, whether or not the offence is proven will depend on the evidence."

Second Partial Award

20. The Tribunal on 9 May 2007 considered whether, at the close of evidence from ASADA, the Appellant had a case to answer. In its consideration, the Tribunal adopted the above view it expressed on the definition (as contained in Clause 15.1 of the policy) of the offence of "trafficking" and then examined the purpose of the meaning of the words used in the definition, particularly, "possession" saying at [49] and [51]-[51]:

> "49. The Tribunal considers that for the purposes of 2002 ADC "possessing" a prohibited substance involves the intentional exercise of physical custody or control over that substance. Knowledge of the presence or existence of that substance in the wrongdoer's possession is a necessary element of the offence: *He Kaw Deh v The Queen* (1985) 157 CLR 523 [*sic*] a decision of the High Court of Australia, see Dawson J at 598. Inferences of knowledge can be properly drawn from the surrounding circumstances. Ibid. Further, the word "possession" is capable of embracing a relationship between a person and goods, which, although not in that person's physical custody are held by another from whom that person can require production: see French J in *ASC Dalleagles* at 108 ALR 305 at 313, citing with approval *Sullivan v Earl of Caithness* [1976] 2 WLR 261 at 363.
>
> 50. …

> 51. … as long as a person has some degree of control, including the right to require another person who is in possession or who has physical custody of that thing to deal with that thing in accordance with the direction of the person making that direction, the first person is in possession of that thing: *Dalleagles* at 313.
>
> 52. The submissions made on behalf of each of the parties focused almost exclusively on the meaning of the word "possessing" in the 2002 ADC. The respondent did not deal with those two concepts and the applicant proffered the ordinary meaning of those words as defined in the Macquarie Dictionary which defined "hold" as:
>
> > "1. To have or keep in the hand; keep fast; grasp. To reserve, retain, set aside … To keep in custody; detain …. 7. To have ownership of or use of … 16 To keep or maintain something."
>
> and the word "store" as
>
> > "… 13 To supply or stock with something as for future use. 14. To lay up or put away, as a supply for future use."
>
> 53. The Tribunal is for the present purposes content to accept those definitions adding, however, the knowledge of holding or storing is a necessary element of the offence."

The Tribunal then held at [61]:

> "The Tribunal has not dealt with all the facts and inferences detailed by the parties in their submissions because what has been dealt with is sufficient for the Tribunal to be satisfied that there is evidence capable of establishing the case against the respondent, and that the evidence against him is not sufficiently unsatisfactory or unreliable that it should not be acted upon."

The Final Award

21. On 9 June 2007, the Tribunal then made a number of findings of fact as follows:

- As to the Appellant's occupation of the bedroom, at [64]-[65]:

"64 The Tribunal concludes that [Mr Marinov] was the sole occupier of the bedroom on the first floor of the house owned or occupied by Murphy from sometime in August 2003 until sometime after November 2003. The Tribunal finds that contrary to the evidence he gave to the Tribunal that he was in the process of moving out of Murphy's house before he left for Canada, he only moved out of that bedroom when he returned from Canada in November 2003 after his father-in-law advised him to move out when he was informed that Murphy was arrested for being in possession of drugs that were found in Murphy's house.

65. The Tribunal considers that there were sufficient items of his clothing and personal effects in the bedroom, including photographs of his children, to conclude that he had not moved out. The Tribunal accepts that the respondent had some items of his clothing and other personal items at his father-in-law's house but it is probable that those items were left there not because he was moving out of Murphy's house but because he did not need them at Murphy's house whilst he was using the bedroom at Murphy's house.

- As to the packets in the wardrobe of the bedroom at [74]-[77]:

"74 … The Tribunal finds that the respondent, despite his stated lack of height, would have been able to see the packets on the shelf where the Police photographed them when he was close to the wardrobe and certainly if he stepped back from the wardrobe one or two steps.

75 The three packets were clearly labelled. In cross-examination he was able to identify that "DECA DURABOL" was an anabolic agent, that "Nandrolone" is a similar agent that enhances performance and that "ILIUM STANABOLIC" is an anabolic steroid.

76 The Tribunal concludes that if the three packets were on the shelf when he first occupied the bedroom in August 2003, the respondent would have seen the three packets and would have known that they contained substances prohibited by the 2002 ADP.

77 The Tribunal finds that the respondent had custody or control of the three packets on 14 November 2003 and since August

> 2003. He occupied the bedroom exclusively from August 2003 and accordingly had custody or control (possession) of the room and its contents in which the prohibited substances were found…"

22. The Tribunal then concluded at [78] the Appellant:

> "…knew that the packets were on the shelf in the wardrobe in his bedroom, that he knew the packets contained prohibited substances, and that he had the power and ability to remove them or have them removed from his possession, and accordingly was possessing them and holding them."

and at [79] the Appellant:

> "… committed a doping offence of trafficking by possessing and holding prohibited substances contrary to the 2002 ADP."

Sanction

23. As to the Sanction, the Tribunal held at [80]:

> "…as this is the respondent's second offence, the Tribunal is required to impose the mandatory sanction of being ineligible for life from being selected to represent Australia in international competition, from competing in any events and competitions conducted by or under the auspices of the AWF, from receiving direct or indirect funding assistance from the AWF and from holding any position within the AWF."

Costs

24. As to Costs, the Tribunal rules at [94]-[95]:

> "94 Taking all of those matters into account the Tribunal considers that it is a fair balance between the competing interests of the application and the Respondent to order that the Respondent contributes to the applicant's costs the sum of $7000 within 60 days of this award unless the parties can come to an

arrangement for payment to be made on terms acceptable to both of them.

The Arbitration Costs

95 Rule 64.4 of the Code requires the CAS Court Office, upon conclusion of the proceedings, to determine the final amount of the costs of the arbitration, to include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the contribution towards the costs of witnesses, experts and interpreters. Rule 64.5 of the Code makes provision for the apportionment of the costs between the parties, if the Tribunal thinks it is appropriate to make such an order. In general, the losing party will bear the costs of the arbitration. In the present case, the applicant has been successful but in view of the Respondent's financial situation, the Tribunal considers it reasonable to order that the Applicant pays 50% and the Respondent 50% of the costs of the arbitration in an amount which will be notified to them by the CAS Court Office."

Submissions

The Appellant

25. The Appellant submitted the Tribunal fell into errors of law in its conclusions as to the legal implications of the definition of "trafficking" in clause 15 and the purpose of the word "possessing" as recited in that definition.

26. The Appellant contended that the charge of "trafficking", read in its full context within the AWF Anti-Doping Policy and in the application of the word's ordinary meaning, required ASADA to lead evidence the person charged was in some way involved in the distribution and dealing of the prohibited substance and not be merely in physical possession of the substance. The Appellant submitted the references to "possessing", "holding" or "storing" in the charge are merely discrete components (indicating a whole range of activities) which a person "trafficking" might undertake, but such activities must have the purpose of "trafficking".

27. The Appellant submitted clause 3.2(a) of the Anti-Doping Policy required some degree of conduct on the part of the person allegedly in possession, greater than mere possession itself, which conduct related to the actual supply of prohibited substances to others. Such "possession", "holding" or "storing" on the part of the person concerned must be for the actual "purpose" of "trafficking" (*United States Anti-Doping Agency v Montgomery* CAS 2004/0/645, Preliminary Award dated 4 March 2005 and *United States Anti-Doping Agency v Gains* CAS 2004/0/649, Preliminary Award dated 4 March 2005).

28. Further, the Appellant submitted, on a reading of the AWF Anti-Doping Policy "a non-athlete can be in possession of such a substance for personal use". The Appellant contended ASADA had failed to prove the purpose of the possession was "trafficking", was supplying the substance to others and noted no such allegation had been particularised against the Appellant.

29. The Appellant contended if clause 3.2(a) is ambiguous, the issue should be resolved in the Appellant's favour (*USA Shooting and Quigley v International Shooting Union* (UIT) CAS 94/129 Award, 23 May 1995).

30. As regards to findings of facts, the Appellant submitted the Tribunal erred in its determination that the Appellant: knew the packets and vials of drugs were on the top shelf of the wardrobe; knew such packets contained prohibited substances; could see the packets and knew of their contents and therefore was in possession of drugs; could have removed the packets. In so finding, the Appellant submitted the Tribunal failed to find another person possessed the drugs; failed in its finding there could be joint possession of the drugs; and failed to find, in accordance with the relevant Anti-Doping Policy, as to the purpose of the possession (an essential element of the offence).

31. Further, the Appellant submitted the Tribunal misdirected itself in the application of the test for "possessing" and in its findings as to the Appellant's "knowledge" at the asserted date of the breach. The Appellant contends the Tribunal erred in finding "joint possession" of the packets. While the Anti-Doping Policy does not specifically state exclusive custody or control was necessary, the view the Tribunal expressed that it was unlikely Mr Murphy would put the packets on the shelf in the Appellant's

bedroom after 12 November 2003 cannot be proof the Appellant had the requisite "knowledge" the packets were there, the Appellant submitted.

32. Further, the Appellant submitted the Tribunal failed to apply the relevant standard of proof. The Appellant conceded the Tribunal acknowledged the applicable standard of proof required of ASADA in prosecuting the breach but the Tribunal failed to apply that standard to the Tribunal's findings of fact.

33. The Appellant contended the Tribunal misapplied the rule of *Jones v Dunkel* (1959) 101 CLR 29 in making those findings of act. The onus for establishing the necessary element of possession, storing and/or holding of the banned substance lay with ASADA and there was an obligation on ASADA to call Mr Murphy. The Appellant submitted facts found without the presentation of the best evidence should be called into question.

34. The Appellant submitted the Tribunal made an excessive order as to costs.

The Respondent

35. On appeal the Respondent submitted in regard to the definition of "trafficking": the definition is clear on its face; the definition is expressly referred to in the Anti-Doping Policy; the definition extends to the scope of the common law use of the word; it was not necessary to infer any element of knowledge, as the requisite knowledge is expressly included in clause 3.2(a) which states that a person must be "knowingly involved in trafficking"; the case of *French v Australian Sports Commission* CAS 2004/A/651 (11 July 2005) is to be distinguished on the basis the Rule of the Tribunal was considering there did not state as to knowledge; there was no reason to read down the meaning of "trafficking" (as occurred in *Montgomery*).

36. As to "possessing", the Respondent contented the Anti-Doping Policy does not define "possessing" but submitted it should be interpreted widely and there was no warrant to limit the term to "exclusive" possession. Further, the Respondent contended there was no finding of joint possession at [69] of the decision, rather the Tribunal held custody or control does not have to be exclusive. The charge of "holding" and/or "storing" is different from "possessing" and does not require an element of ownership, only

"knowledge" that the packets were there and what they contained. The Respondent submitted the finding of facts were reasonably open to the Tribunal, who saw the witnesses and assessed their credibility and was able to make inferences from that evidence. Those findings of fact should not be disturbed on appeal.

37. The Respondent submitted under the applicable standard of proof: there is no obligation upon the arbitrator to identify a "moderate or well or high etc" level of comfortable satisfaction and the Tribunal found the case proven to the requisite standard.

38. As to the application of the rule in *Jones v Dunkel* (1959) 101 CLR 298 consistent with the principles expressed in *Payne v Parker* (176) 1 NSWLR 191 (per Glass JA at 201-202) and *O'Donnell v Reichard* [1975] VR 916 (at 92), ASADA would not call a witness who had admitted trafficking in kilograms of anabolic steroids, the Respondent submitted. Further if, on appeal, the Panel finds that ASADA should have called Mr Murphy, the failure by ASADA to do so raises no inference sufficient to overturn the decision of the learned Tribunal.

39. The Respondent submitted the Tribunal made express findings of fact based on the evidence and such facts should not be overturned. The evidence established the Appellant would have been able to see the packets on the shelf (at [74] of the Final Award); the three packets were clearly labelled (at [75] of the Final Award); the Appellant would have known of the contents of the packets (at [76] of the Final Award); the Appellant occupied the bedroom exclusively and had custody, control and possession of the room and the contents in the room; the Appellant knew the names of the drugs from the labels. The Respondent contended all the above findings were indicative the Tribunal did not accept the Appellant as a witness of truth.

40. As to costs, the Respondent submitted: Rule 64 of the Code is applicable; costs are discretionary; the Tribunal gave consideration to the relevant authorities and, in the use of the discretion, determined an appropriate amount. The costs order of the Tribunal should be upheld.

Consideration

41. It is the Appellant's case the Appeal Panel would not be satisfied there was sufficient evidence to give foundation to the findings of facts on which the Tribunal based its determination that the Appellant held the requisite knowledge the packets were there and the Appellant knew of their contents. Such findings of fact were the foundation for the findings at law that the Appellant "had custody or control of the three packets" and was "therefore "possessing" and "holding" the packets (within the meaning of the 2002 Anti-Doping Policy) and had therefore "committed a doping offence of 'trafficking' by possessing and holding a prohibited substance".

42. As to the Appellant's contents the Tribunal misapplied the definition "trafficking" under clause 15.1 and clause 3.2(a), it is a matter of construction that when the word "means" is used in a definition it amplifies the natural meaning of the word. It has the effect of conclusively and exhaustively prescribing the ambit of the definition (see *Sherritt Gordon Mines Ltd v FCT* (1976) 10 ALR 441 at 455; *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 at 401). Therefore, for the purpose of the AWF Anti-Doping Policy, "trafficking" encompasses all the forms of conduct listed in the definition. "Trafficking" therefore is "possessing", "holding" and/or "storing" the prohibited substances. We adopt the words of the Tribunal at [28] that the definition of "trafficking" contains:

> "… a number of component words, any one of which alone or in combination with each other disclose the offence of "trafficking" if a person has knowledge of that component. *French v Australian Sports Commission and Ors* (CAS 2004/A/651)."

We find no error of law was made by the Tribunal in this determination.

43. As to the meaning of "possessing", "holding" and/or "storing" as used within the definition, the Tribunal adopted the view expressed in *French v Australian Sports Commission and Cycling Australia* (CAS 2004/A/651, 11 July 2004) which relied on the view expressed in *He Kaw The v The Queen* (1985) 157 CLR 523 by Dawson J (at 598):

> "As with importation, possession is a concept which contains within it a mental element. As Aickin J observed in *Williams v R* (1978) 22 ALR 195 at 209; 140 CLR 591 at 610:

> It is necessary to bear in mind that in possession there is a necessary mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused. No doubt in many cases custody of an object may supply sufficient evidence of possession, including the necessary mental element, but that is because the inference of knowledge may often be properly drawn from surrounding circumstances …
>
> Possession may be an intricate concept for some purposes, but the intricacies belong to the civil rather than the criminal law. As was observed in *DPP v Brooks* [1974] AC 862 at 867, the technical doctrines of the civil law which separate proprietary and possessory rights in chattels are generally irrelevant for the purposes of the criminal law. There the concept is a basic one involving the intentional exercise of physical custody of control over something. Knowledge is the basis of the necessary intent. There may be a sense in which physical custody or control can be exercised over something in ignorance of its presence or existence, but this has never been considered sufficient to amount to possession in law.
>
> This is what Griffith CJ meant in *Irving v Nishimura* (1907) 5 CLR 233 at 237, when he said:
>
> > If a man has something put into his pocket without his knowledge, he cannot be charged with having it unlawfully in his possession, if that fact appears.
>
> Although intent must be based upon knowledge, it is the degree of knowledge required which poses the difficult question."

The Arbitrator then concluded at [36]:

> "…Knowledge that the substances are in the room and the ability to exercise control over the substances in the room is required. Exclusive control is not necessary. A person can have the ability to exercise control over the substances even though he or she is not physically present in the room at all times and temporary absence may not matter."

44. We accept this conclusion in so far as it goes. We also accept that "knowledge" is a necessary element in the offence of "trafficking", be it by

"possessing", "holding" and/or "storing" the banned substances. Clause 3.2(a) of the Anti-Doping Policy clearly incorporates this legal interpretation as the clause specifically states a person commits an offence if he/she is "knowingly involved in tracking". We therefore accept ASADA had to establish, at least, that the Appellant had knowledge the packets were in the wardrobe and knew the substances contained therein. In order for the Appellant to have committed the offence of "trafficking" under the terms of the charge he had to knowingly be engaged in "storing", "possessing" and/or "holding" the prohibited substances. Once it has been properly established he knowingly was in possession or holding, or storing the packets and knew what they contained, he is, under the AWF definition, "trafficking". We reject the proposition evidence was required of the "purpose" of holding, storing or possessing. Knowingly "holding or possessing" is trafficking. As will be apparent from what follows, however, it is another question as to what amounts to "holding, storing or possessing" for the purposes of the Policy (see [46]-[55] below).

45. Having found the Tribunal made no error in its approach to the definition of the "trafficking" offence within the Policy, we turn to the Appellant's challenge to the relevant findings made by the Tribunal and the evidence it relied upon as foundation for those findings.

46. We have examined the photographs, the video, read the evidence and heard submissions. We are satisfied the Tribunal's finding at [77] that the Appellant was the sole occupier of the bedroom at the relevant time is sustained but only if the word "occupier" is used in a colloquial not a legal sense. We accept the evidence relied upon to give foundation to this finding of fact, namely: the neatness of the room compared to the state of the other rooms occupied by Mr Murphy; the content such as clothing and personal effects of the Appellant including photographs of the Appellant's children still in the room and conclude such evidence was sufficient for the Tribunal to reasonably conclude that no one else "occupied" the room at the relevant time, in the sense that no one else used it for its intended purpose as a bedroom. However, a critical question to determine is whether, as the Respondent contends and the Tribunal found, a person who as "occupation" of premises in the circumstances that existed here in the case of the Appellant, had the requisite ability to "control" those premises or the contents thereof so as to satisfy the concept of holding, possessing or storing.

47. Thus, the main relevance of "occupation" so far as we can see is in respect of the Tribunal's conclusion at [36] (accepted by the Respondent) that "ability to exercise control over the substances in the room is required. Exclusive control is not necessary for the purposes of satisfying the concept of "holding, storing or possessing".

48. Both before us and before the Tribunal the Respondent claimed there were only four possible factual possibilities in this case as follows:

(a) the Appellant knew the drugs were there at all times,

(b) between 12 November 2003 and 13 November 2003, for some unknown reason, Mr Murphy entered the room and decided to put the drugs on the shelf,

(c) someone else put the drugs on the shelf between 12 November and 13 November 2003,

(d) the drugs were always there (ie at all times whilst the Appellant was in "occupation" of the room) and the Appellant did not see them.

49. The Respondent contends there are no other possibilities and, upon that basis, if scenarios (b), (c) and (d) above are rejected leaving only scenario (a) then the appeal must fail. The Respondent asserts it is not necessary to prove the Appellant put the drugs there (or that the drugs were his). It is sufficient, according to the Respondent, for the drugs to have been there and for the Appellant to have known that in the circumstances where he was in sole "occupation" of the room and hence, allegedly, had the power to exercise some form of control over those drugs, even if they were not his (see [39] and [43] above and [36] and [77]-[78] of the Tribunal's Final Award).

50. We disagree because, with respect, the Respondent's submission and the Award of the Tribunal mistakenly attribute to the Appellant, by reason of this so-called "occupation" of the room, powers of control which he did not legally or even practically possess.

51. We have already mentioned the nature of the occupation of the room in Mr Murphy's house by the Appellant (see [15] above). It was gratuitous

permission to the Appellant given by Mr Murphy for the Appellant to enter Mr Murphy's home and to stay in the room. As such the Appellant had a **bare licence** in respect of the room. A bare licence is the simplest form of licence. A bare licence, being gratuitous **does not give** a licensee enforceable rights of occupation against a licensor. Nor does it give a licensee exclusive occupation of the land (the room). The legal effect of a bare licence is merely to preclude an action of trespass against the licensee during the currency of his or her licence to enter the premises. Such a licence is revocable at any time at the will of the grantor. An action of trespass would lie against a licensee if he or she remains on the land after expiration or revocation of his or her licence or if he or she oversteps the limits of the licence (see, eg the *Laws of Australia*, Vol. 28, Pt 28.10, [28.10.68] pp 617-618).

52. When the extremely limited and temporary nature of rights in respect of the room enjoyed by the Appellant are properly appreciated, it is clear, in our view that, as a bare licensee, the Appellant had no right of "control" over any items of furniture, etc in the room or any other goods which may have been in the room other than those which form part of the Appellant's own property or which he was otherwise in legal possession of (for example, if he had borrowed something from another person and placed that in the room). To say he had "control", of any nature, over items of clothing, furniture or any other object left in the room by Mr Murphy or anyone else is both legally and factually incorrect in our view. Nor did the Appellant have the right to require Mr Murphy or anyone else to deal with the packets of drugs at this direction (see [51] of the Second Partial Award of the Tribunal set out in [20] above). (Distinguished on the facts and the law from *International Cycling Union & Italian Cycling Federation v Marco Pantani* (CAS 2002/A/403 & 2002/A/408, 12 March 2003)).

53. Accordingly, a finding in accordance with [48](a) above is not, by itself, sufficient to establish the charge. Unless the drugs were the Appellant's property or put on the shelf by him, the mere fact the packets were on the shelf and the Appellant knew they were there would not be sufficient to establish the charge because, as we have found, the Appellant did not have requisite control over those goods. This is the case even in a circumstance where the Appellant knew the packets contained prohibited substances.

54. Neither before us, nor before the Tribunal, did the Respondent directly make the case that the Appellant placed the drugs on the shelf himself or that, as a matter of fact, the drugs were the Appellant's property. Nor is there any evidence before us which would have justified such a submission. The fact Mr Murphy pleaded guilty to possession of those very drugs is, indeed, evidence to the contrary. In the absence of evidence to the effect that the Appellant placed the drugs there, or that they were his, we cannot make inferences to that effect and, consequently, we see no other conclusion than the Appeal must be allowed.

55. The Respondent rightly acknowledges that if any of the scenarios set out in sub-paragraphs (b), (c) or (d) of [48] above is accepted then the Appeal must succeed. If, in addition, in respect of scenario (a) there is the necessity, on the facts of this case, to prove that the Appellant put the drugs there or they were his property then scenario (a) also cannot be made out. We have already found there is that additional necessity (see [51]-[53] above).

56. It follows, for these reasons alone, the appeal must be allowed. However, in deference to the helpful and detailed submissions made by the parties and to the careful reasoning of the Tribunal, we shall briefly discuss the other matters advanced in the appeal although, for the above reasons, the appeal must be allowed irrespective of our conclusions in respect of those other matters.

57. We are satisfied the Appellant's evidence gives foundation for the finding the Appellant, had he read the labels on the three packets, would have known they contained substances prohibited under the IOC list. We accept the Appellant, from his own evidence, recognised the generic labels and knew what substances were contained therein. It was not in dispute he knew those substances were prohibited substances under the Policy (see Final Award at [75]).

58. We are also satisfied the Tribunal applied to the evidence the relevant standard of proof in its determination (see Final Award at [6], [38], [53] and Second Partial Award at [39]-[40]). We are satisfied the Tribunal concluded to its "comfortable satisfaction" that ASADA had established from the evidence the above facts. The Tribunal was aware the consequences, if there was a breach of the policy, were serious (such as the sanctions affecting an athlete's ability to earn a living or to compete in his

or her sport). In Australia, the standard of proof required in such a matter was referred to in *Briginshaw v Briginshaw* (1938) 60 CLR 336 as that of the Tribunal's "reasonable satisfaction" that the breach occurred (*French v Australian Sports Commission and Cycling Australia* CAS 2004/A/651, 11 July 2004). We find the applicable standard of proof required of the Respondent to establish findings of facts was the standard of "comfortable satisfaction" and we find that was the standard applied by the Tribunal to satisfy itself as to those findings of fact.

59. Assuming, contrary to our views, that the Appellant had the ability to exercise "control" over the drugs, it remains for us to consider the other findings of fact made by the Tribunal which were vital to the finding by the Tribunal at [79] that the Appellant was guilty of trafficking by "possessing and holding a prohibited substance".

60 The totality of the evidence, the Respondent concedes, was circumstantial in nature. It requires the drawing of inferences where there is no direct evidence. Generally, in a civil case, inferences must be drawn on the balance of probability and there need only be circumstances raising a more probably inference in favour of what is alleged but, before it can be drawn, the inference must be something which follows from a given premise as being at least probably true (*Chapman v Cole* (2006) 15 VR 150 at 154 [14]). However, inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the facts which it is sought to establish. In some cases, other facts can be inferred with much practical certainty (as if they had been actually observed). In other cases, the inference does not go beyond reasonable probabilities. But if there are no positive proved facts from which inference can be made, the method of inference fails and what is left is mere speculation or conjecture (per Spigelman CJ in *Seltsam Pty Limited v McGuiness* (2000) 49 NSWLR 262 at 276 [87] quoting Lord Wright in *Caswell v Powell Duffryn Associated Collieries Limited* [1940] AC 152 at 169-170).

61. Moreover, in a civil case like this, where the balance of probability needs to be established in the *Briginshaw* context, it follows that inferences should not be drawn unless the Tribunal is "comfortably satisfied", in accordance with the comments in *Briginshaw*, that the inference is something which follows from given premises as being at least probably true.

62. One matter relied upon by each party against the other is that an adverse inference should be drawn by reason of the failure to call Mr Murphy to give evidence. Mr Murphy pleaded guilty in a criminal prosecution for possession of the prohibited substances contained in the three packets in question. In our view, even if it is otherwise permissible in a hearing such as this to draw such an inference, the failure of each side to call Mr Murphy was understandable. We are not convinced Mr Murphy should be viewed as being in either party's "camp" and we do not accept any adverse inference should be drawn against either party by reason of his failure to give evidence.

63. We should also point out, although it is somewhat unclear in the Award of the Tribunal, the Respondent candidly and properly acknowledged before us it was not seeking to argue that this was a case of joint possession. Accordingly, we do not pause to consider the legal and factual intricacies of such a concept.

64. The Respondent submits scenario (a) in [48] above is satisfied because, as a matter of probability, it ought be inferred the Appellant would be able to see the packets containing the drugs on the shelf when he opened the wardrobe in the bedroom and the drawing of such an inference is made easier by the Appellant's "consciousness of guilt" as demonstrated by allegedly false or untruthful evidence he gave before the Tribunal.

65. Consistently with the authorities to which we have referred, we think it is a matter of conjecture or speculation as to whether or not the Appellant could have seen the drugs on the wardrobe shelf and thus decline to draw the inference urged upon us.

66. In very large part, the drawing of the inference depends upon the photographic evidence contained in the video and still photographs taken by the Police. Unfortunately, however, no measurements were taken nor, even, do we know the height of the photographer or how the photographs were taken. What we do know is that the Appellant was a very short man, being five feet in height. We do not know the height of the shelf above ground level and have nothing more upon which we can reliably assess the relevant lines of sight. Nor did, with respect, the Tribunal.

67. It is by no means obvious to us from the photographic evidence that a man of such stature standing anywhere in the room (except perhaps standing on the bed) was, more likely than not, in a position to see the packages containing the drugs and, from that location where he could see such packages, to read the labels on those packages in order to become aware that they contain (or may contain) prohibited substances. It would be fanciful, of course, to infer, absent evidence, that the Appellant stood on the bed.

68. It is true the Appellant acknowledged seeing the Metamucil container on the shelf in the wardrobe, however, as is apparent from the photographic evidence, the Metamucil container was much taller than the packages containing the drugs. Accordingly, depending upon the relevant line of sight, it is at least possible that a man of the stature of the Appellant could see the Metamucil container, or at least a part of it, whilst not seeing the other packages.

69. All in all, upon the evidence, we are not comfortably satisfied that the Appellant could have seen the packets of drugs on the wardrobe shelf or could have seen them in such a way as to also be able to read the labels and hence know that those packages contained prohibited substances.

70. Therefore, even if the Panel is wrong in concluding that the Appellant did not have the ability to "control" the drugs and hence could not, either as a matter of law or practicality, be said to be "holding, possessing or storing" them, nevertheless we would allow the appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal is upheld.

2. Orders as to the Appeal on Costs in the primary hearing and orders as to Costs of the Appeal are reserved.

3. The Appeal Panel will determine Costs on the papers unless otherwise submitted by the parties. The Appeal Panel directs that the Parties file with the CASE Oceania Registry their submissions relevant to the question of

Costs in the primary hearing and any application for Costs on the appeal in accordance with the following timetable:

(a) The Appellant's evidence and submissions on Costs are to be filed and served by 29 September 2007.

(b) The Respondent's evidence and submissions on Costs are to be filed and served by 6 October 2007.

Sydney, 26 September 2007.

THE COURT OF ARBITRATION FOR SPORT

The Honourable Justice Tricia Kavanagh	President of the Panel
The Hon John Winneke QC	Arbitrator
Alan J. Sullivan QC	Arbitrator