

**THINGS NADA SHOULD HAVE CONSIDERED WHILE ARRIVING AT ITS DECISION IN THE
CASE OF NARSINGH YADAV**

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I. INTRODUCTION:

With the Olympics Games (“**Games**”) in Rio all set to begin, doping controversies seem to have broken out like never before. The International Olympic Committee (“**IOC**”) has lifted the blanket ban it had earlier imposed on Russian athletes and left it on the individual sporting federations to decide their fate. They have, however, made ineligible any Russian athlete who has faced a doping suspension in the past. In other news, six weight-lifting medalists have tested positive from the 2012 Olympics when their samples were re-examined and 18 cases (the highest ever) have already been registered with the CAS Ad-Hoc Division in Rio even before the Games have begun. India, unfortunately, is not too far behind in this race of infamy.

India maybe considered a sporting minnow in terms of the medal tally but in terms of doping cases India has ranked third both in 2013 and 2014 according to the Anti-Doping Rule Violations Report released by WADA.

The most recent doping scandals to have hit India are that of Narsingh Yadav (wrestler) and Inderjeet Singh (shot-putter), both of whom being medal prospects at the Rio Games. The case of Mr. Narsingh Yadav has come into public limelight not just for him having failed his doping test but because he had in May, 2016 fought and won a long legal battle against Sushil Kumar, who had also staked claim to represent India in the 74kg free-style wrestling category.

II. FACTS:

The following facts are based on what has come into public knowledge through various media reports in the case of Narsingh Yadav since Sunday, July 24th, 2016 (the day the news of him having failed his doping test came into public domain):

- A. Narsingh Yadav went through three doping tests in a span of 5 weeks: June 2nd, June 25th and July 5th, 2016. The July 5th, 2016 test was apparently done on the request of WADA as they were suspicious of Narsingh Yadav’s form.
- B. It is alleged by Narsingh Yadav that someone tried to mix something in his food on June 5th, 2016. As soon as it came to the notice of his team, the food was thrown away. However, the matter was not reported to Sports Authority of India (“**SAI**”) or the Wrestling Federation of India (“**WFI**”).
- C. Yogeshwar Dutt, a fellow wrestler, claims that Yadav had shared details of the said incident with him, who in turn warned Yadav and insisted that Yadav be extra cautious while consuming anything edible, giving Yadav his own example as to how he gets his food cooked separately.
- D. Narsingh left for Bulgaria for training for the upcoming Olympics on June 5th, 2016 and returned on June 22nd, 2016.
- E. Post his return, he was practicing in Sonapat on June 23rd and June 24th, wherein he claimed to have left his water bottle unattended during the training sessions.

- F. His samples from June 25th and July 5th returned positive results for metandienone, an anabolic steroid which is a prohibited substance according to the World Anti Doping Agency (“WADA”). The substance is known to help an individual gain muscle mass.
- G. Narsingh requested for his food supplements to be tested by the National Dope Testing Laboratory (“NDTL”) on July 23rd, 2016.
- H. He also filed a complaint with the police authorities on July 26th for the incident that apparently occurred on June 5th, 2016.
- I. On July 27th, the reports of Narsingh’s food supplements returned negative.
- J. On July 27th & 28th, the hearing took place in front of the NADA Panel and the judgment which was initially suppose to be given on July 30th was finally declared on August 1st, 2016.
- K. The decision was due to be pronounced on Saturday, June 30th, 2016 as stated by the NADA Director. However, before the decision could be pronounced there was a protest by Narsingh’s supporters outside the Prime Minister’s house. Thereafter, news came in that the pronouncement of the judgement had been postponed to Monday, August 1st, 2016.
- L. Narsingh Yadav through the judgment delivered on Monday, August 1st, 2016 was given a clean chit by the National Anti-Doping Agency (“NADA”) hearing panel, who accepted his argument that he was victim of a conspiracy.

III. ANALYSIS:

- A. Firstly, no notice has been taken or for that matter nothing has so far been said of Narsingh Yadav’s sample that was taken on June 2nd, 2016. It is a matter of concern that the results of this sample collection is not back from the lab yet. The entire case of Narsingh claiming to be a victim of a conspiracy could be thrown out if this above mentioned test reports were to come back positive.

Since both, the WFI’s lawyer and Mr. Yadav’s lawyer at the time of the hearing in the *Sushil Kumar vs. Union of India* made claims which have been recorded in the said judgment that Mr. Yadav at that point was trying to gain weight and intended to lose weight only one month before the Olympics, which is a normal practice amongst wrestlers before any competition (para 20 and 60 of Sushil Kumar judgment).

Therefore, the possibility of Mr. Yadav having taken the banned substance sometime in May, 2016 cannot be ruled out unless the June 2nd test reports return negative, considering that the detection level of metandienone is 4-6 weeks.

- B. Mr. Yadav had allegedly received threats to his life at the time of hearing in the Sushil Kumar matter and had asked for police protection. He was granted the same on May 20th. It is rather surprising that Narsingh and his support staff merely chose to throw away the food instead of reporting this grave matter to the WFI or SAI, especially when such an episode caused a threat to his career.

Such an attitude on the part of an athlete maybe termed as careless. Being a reputed international athlete, Narsingh should have reasonably anticipated that a similar attempt could be made in the near future. Especially given the fact that a duplicate set of keys for the room are always available

with the hostel authorities and the same is common knowledge therefore extra precaution must have been taken.

- C. After returning from Bulgaria on June 22nd, Narsingh resumed his training at the SAI Centre in Sonapat on June 23rd. During his daily training which essentially amounts to two sessions a day, he claimed to have left his bottle of water un-attended on two days (June 23rd and June 24th), which is a total of four occasions of giving someone a chance to mix something in his bottle. Having been warned by Yogeshwar Dutt after facing the June 5th episode, this careless behavior should have been considered as fault or negligence on the part of Yadav.

Fault is defined in the WADA Code, 2015 as follows:

"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2."

- D. Furthermore, fault on the part of an athlete has been in the limelight since the start of the year as the most shocking controversy to have hit the sporting world in 2016 is that of Maria Sharapova, a case entirely based on what may amount to fault on the part of an athlete. Sharapova on March 12th, 2016 issued a public statement:

"... On December 18, I received an email with the subject line "Player News" on it. It contained a newsletter on a website that contained tons of information about travel, upcoming tournaments, rankings, statistics, bulletin board notices, happy birthday wishes, and yes, anti-doping information. On that email, if a player wanted to find the specific facts about medicine added to the anti-doping list, it was necessary to open the "Player News" email, read through about a dozen unrelated links, find the "Player Zone" link, enter a password, enter a username, read a home screen with more than three dozen different links covering multiple topics, find the "2016 Changes to Tennis Anti-Doping Program and Information" link, click on it and then read a page with approximately three dozen more links covering multiple anti-doping matters. Then you had to click the correct link, open it up, scroll down to page two and that's where you would find a different name for the medication I was taking.

In other words, in order to be aware of this "warning", you had to open an email with a subject line having nothing to do with anti-doping, click on a webpage, enter a password, enter a username, hunt, click, hunt, click, hunt, click, scroll and read. I guess some in the media can call that a warning. I think most people would call it too hard to find..."

She was awarded a two-year ban based on the strict liability rule of the WADA Code.

Article 2.1.1 of the WADA Code, 2015 states as follows:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Matabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS."

Drawing a parallel from the Sharapova case, we can conclude that just as Ms. Sharapova having been an international athlete for almost two decades was expected to exercise a greater degree of care, Narsingh too, having participated in wrestling competitions for almost a decade and having attended several camps on anti-doping education and having gone through several doping tests was duty bound to be extremely vigilant and not show any amount of carelessness just before the biggest sporting spectacle of his career i.e. the Olympic Games, thereby not giving anyone a chance to contaminate anything he was consuming.

- E. Another thing worth considering is the level of metandienone found in Narsingh's samples taken on June 25th and July 5th. The two possible theories, based on the detection time of the substance being 4-6 week, can be summarized as follows:
- i. If Narsingh had unknowingly ingested the prohibited substance on June 23rd or 24th, the level of metandienone found in the sample collected on June 25th should be fairly high and slightly reduced in the sample taken on July 5th, 2016.
 - ii. However, the second proposition is that if Narsingh consumed the prohibited substance in May or early June, then the level of metandienone found should be fairly low or negligible in both the samples collected on June 25th and July 5th. Also there would not be a vast difference in the values of the level of metandienone found since these tests were probably conducted towards the end of the detection period.

This is another reason why the results of the 2nd June test are of utmost importance. If the banned substance was administered in the month of May, it would definitely show up on the 2nd of June test results and in turn prove his theory of contamination incorrect.

- F. Also, the burden of proof on how a prohibited substance has entered the body of an athlete is on the athlete himself. This principle has been clearly established in WADA vs. ITF and Richard Gasquet (CAS 2009/A/1930):

"In view of these provisions, it is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely

than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred."

Unfortunately in the case of Narsingh Yadav, he only has mere suspicion that the substance may have entered his body through the food (para 17 of his affidavit) or water (para 18 of his affidavit), however this claim has not been supported with evidence, therefore not being able to satisfy the burden of proof.

Furthermore, with regard to the above the WADA Code in article 3.1 states:

"Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability."

G. While in Gasquet the panel could say with authority that:

"Considering these facts, the Panel concludes that it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspecting environment like an Italian restaurant ("Vita"). He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night. Also, the Panel concludes that it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him. As the Player did not know Pamela's cocaine history and did not see her, during the entire evening, taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how should he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand? The parties' experts in the present matter concluded only after some study that this is possible. The members of the Panel are not reluctant to admit that they would not have believed, without having seen the statements of these experts that such a means of contamination is possible. The Panel's position is thus clear: even when exercising the utmost caution, the Player could not have been aware of the consequences that kissing Pamela could have on him. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine."

However, the NADA panel should not have been able to say with authority in the case of Narsingh Yadav that he exercised utmost care while training on June 23rd and 24th, given that he had already faced threat of sabotage on June 5th and therefore another attempt should have been fairly foreseeable by a reasonable man. He therefore had a duty to exercise extra caution which he did not do.

- H. Another aspect of the case that is important to note, even though now maybe irrelevant, is that Narsingh also claimed during his first hearing on Saturday July 23rd, 2016 that the source of prohibited substance could be the food supplements he was consuming. The tests of the food supplements have returned negative; therefore, they cannot be the source of the prohibited substance. However, what is also pertinent to mention here is that there is ambiguity with regards to who sent the supplements for testing – was it NADA or Yadav, as NDTL does not have the authority to ‘analyse other analytical activities’ i.e. food supplements in the case of Narsingh Yadav unless requested by the National Anti-Doping Agency or the Tribunal.

The Laboratory Code of Ethics under the International Standards – Laboratories as published by WADA states:

“The Laboratory should not provide analytical services in a Doping Control adjudication, unless specifically requested by the responsible Testing Authority or a Hearing Body.

The Laboratory shall not engage in analyzing commercial material or preparations (e.g. dietary supplements) unless specifically requested by an Anti-Doping Organization as part of a doping case investigation. The Laboratory shall not provide results, documentation or advice that, in any way, suggests endorsement of products or services.”

- I. Police complaint / FIR – possibly an afterthought:

Narsingh Yadav filed a police complaint on July 26th, 2016 for the incident that occurred on June 5th, 2016. He did not even consider filing one when his Sample ‘A’ tests returned positive results. This extremely delayed act clearly shows that this was the result of an afterthought and in no way amounts to the degree of care an athlete of his stature should have exercised immediately after the an attempt to sabotage took place.

- J. The Protest and other Controversies

Narsingh’s father and several of his supporters had staged a protest in front of Prime Minister Narendra Modi’s parliamentary office at Ravindrapuri¹ in Varanasi on July 30th, 2016. They demanded a high-level inquiry into the doping scandal. People from their native village, Neema, and its adjoining villages had gathered in front of the office demanding a high-level inquiry. Local politicians had joined the protest.

There are two things to be taken into consideration about the protests: (a) why did the protest take place after all the proceedings were over and (b) the protest was conducted at a time when the judgment was first expected to be pronounced i.e. July 30th, 2016? Is it that Narsingh and his supporters wanted to build up some sort of political pressure, especially since the Uttar Pradesh state elections are around the corner, to try and influence the decision? Is it that Narsingh post

¹ Narsingh's father protests outside PM's Varanasi office, demands 'high-level' probe; available at: <http://www.newindianexpress.com/sport/olympics/Narsinghs-father-protests-outside-PMs-Varanasi-office-demands-high-level-probe/2016/07/30/article3555121.ece>

the proceedings was scared that the decision would not go in his favour and thus needed to bring in the political angle to his case?

Logically, the protests should have taken place when the matter of Narsingh's anti-doping violation came in to public knowledge or post the pronouncement of the verdict. Doing a protest after the hearings and just before the pronouncement is a clear way of creating public pressure since the Director General / CEO of NADA, Mr. Navin Agarwal had said that the decision was likely to come by 6 pm on Saturday (July 30, 2016), which was then conveniently delayed further. The delayed decision was given only on Monday and it was in favour of Narsingh and extremely contrary to what everyone was expecting.

This decision by the NADA Penal and its acceptance by NADA can prove to be extremely problematic for NADA in the long run. It lays down a very bad precedent. Any athlete who wants to use banned substances to gain an unfair advantage over the others can easily do so by merely asking someone to mix the drug in the athlete's food or water. If the athlete is unlucky enough to get tested and if the reports come back positive for doping then he could ask a friend to say that he did it and that the athlete had no idea about the same. This simple process will ensure the athlete getting away with something as serious a sporting crime as doping.

What happened to abiding by the WADA Code where the athlete had to prove that he had no significant fault? What happened to the athlete being more careful and not showing signs of negligence especially since it was already brought to his attention that there was an attempt of a similar nature made on an earlier date (5th June incident).

PSM Chandran² in an interview said that *"Exonerating the athlete by saying there was a sabotage is not an easy verdict, especially when the drug in question is an anabolic steroid and the athlete is a week away from participation in the Olympic Games. It is understood that the NADA hearing panel had strong evidence and witnesses to support the sabotage theory. Such a contention becomes significant when the World Anti-Doping Agency (WADA) code states that the onus of proving how the substance has entered the body rests with the athlete concerned. This is especially important in the case of anabolic steroids, a non-specified substance under the WADA code, in which the sanctions are stringent."*³

Something strange that must be looked into is the fact that everyone who has given an interview regarding the hearing has said that Narsingh could not provide strong enough circumstantial evidence to help his theory. Gaurang Kanth, appearing on behalf of NADA said "... as an international athlete he (Narsingh) should have taken due care about his food and drinks. From what he had produced before the panel there was nothing to prove due care on his part."

Also, in an interview⁴ with the Hindustan Time, a source has said the following:

² President, Indian Federation of Sports Medicine, and former Director (Sports Medicine), Sports Authority of India

³ The Shadow Cast by Doping Allegations; available at:

<http://www.hindustantimes.com/analysis/rio-games-the-shadow-cast-by-doping-allegations/story-x0CnQOiemfLi9ZB4KFCOWM.html>

⁴ Doping Panel Finds Narsingh's Arguments Unconvincing Due To Lack Of Evidence; available at:

<http://www.hindustantimes.com/other-sports/doping-panel-picks-holes-in-narsingh-yadav-s-arguments/story-McimtkKXu2pqr4Qyulz1wO.html>

"Then they have claimed that his water could have been laced sometime between June 23-24. You have to understand that under Nada rule 2.1 it is the task of the athletes to ensure that no (prohibited) substance enters their body. Now if you are claiming that for two days you have not been able to carry out the duty tasked upon you... in two days you'll be training twice, it means that on four occasions you have failed to carry out that duty."

It counters Narsingh's argument to say that it was understandable if he did not notice someone trying to spike his water on one occasion, but not during each of the four training sessions over two days. Not noticing it on all four occasions was simply a casual and lackadaisical behavior which should have amounted to negligence on the part of Narsingh.

"Now if you want relief under the No Fault No Negligence clause... how many times can you be negligent? You can be negligent may be once or twice but not four times," the source added.

The lawyers of Narsingh failed to put forward any concrete evidence to support his case. Narsingh's cook, Chandan Yadav had submitted an affidavit which was helpful in corroborating Narsingh's story, but upon questioning it was found that the affidavit was purchased by the law firm and not by the cook himself. This hints towards there being a plan of the law firm to help sway things in their favour rather than the cook coming up willingly to help Narsingh uncover the truth.

"...the affidavits weren't clear about the time when the alleged incident happened or whether they saw somebody doing it. Also, they could not prove whether the food was contaminated or whether the water was laced." Considering all of the above it is extremely surprising as to how Narsingh managed to get the panel to decide the case in his favour.

IV. CONCLUSION:

A bare reading of the WADA Code reveals that the only circumstances where the punishment for a doping offence maybe reduced to zero and an athlete maybe sent scot-free with a mere reprimand is in the case of No Fault or Negligence on the part of the athlete (10.4 WADA Code) or in the case of No Significant Fault or Negligence (Article 10.5) the substance is a Specified Substance or a Contaminated Products (10.5.1 WADA Code).

At the outset, it is pertinent to note that Narsingh's case does not fall under Specified Substance or that of Contaminated Products. Metandienone is an anabolic agent and therefore does not fall under the Specified Substance category.

Article 4.2.2 of the WADA Code defines Specified Substance as *"For purposes of the application of Article 10, all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. The category of Specified Substances shall not include Prohibited Methods."*

Furthermore, the WADA Code defines Contaminated Product as:

“A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search.”

Since Narsingh Yadav’s food supplements have returned negative results, it cannot be a case of contaminated products either.

The punishment for a case that falls under Article 10.2.2 i.e. unintentional doping is 2 years. Based on the presumption that Narsingh’s samples collected on June 2nd have returned negative results, Narsingh’s case shall probably fall under unintentional doping as there is no logical reasoning for him to consume a prohibited substance which helps to gain weight at a time when wrestlers should be losing weight.

Based on the presumption that Narsingh’s positive results are a case of unintentional doping, the punishment may further be reduced under Article 10.5 i.e. based on the level of Athlete’s Fault to a maximum of half of the otherwise applicable period of punishment. Therefore, if established that Narsingh’s case is that of unintentional doping, we are still probably looking at at least a one to two year ban in accordance with the WADA Code on the basis of the following:

- A. There was foreseeable risk which he chose to ignore after the June 5th episode.
- B. He has failed to establish the exact source of the substance and how it entered his body.
- C. He was negligent to a certain extent in his conduct since he left his bottle of water unattended.

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