

(Williams J, Dr Susan White, Mr Peter Taylor)

D E C I S I O N

HIS HONOUR: The committee has arrived at a decision and we have handwritten reasons which I am about to read out. Unfortunately, there hasn't been time to have them typed by this stage, but everything that is said will be recorded, will be typed up and will be available to the parties as soon as possible.

This is a hearing before the Australian Cricket Board Anti-doping Committee into a charge brought against Shane Keith Warne, an ACB contracted player who has played extensively over about ten years at first class and international level. The charge and its particulars are as follows:

"Charge: Breach of Clause 4.1(b) of the ACB Anti-doping policy, commission of a doping offence by using a prohibited method.

Particulars: On 22 January 2003 Shane Warne, ("the player") provided a urine sample ("the sample") for drug testing by the Australian Sports Drug Agency ("ASDA") in accordance with ASDA's prescribed drug-testing procedures. The sample given to ASDA on the relevant date tested positive for the substances Hydrochlorothiazide and Amiloride. These substances are diuretics which (a) alter; (b) attempt to alter; or (c) may reasonably be expected to alter the integrity of and validity of samples used in doping controls. The presence of either or both of those substances in the player's system constitutes use of a prohibited method by the player".

Warne did not challenge the validity of the finding that the sample he provided tested positive to the banned substances Hydrochlorothiazide and Amiloride. Indeed, in the course of his evidence before the committee which was given on oath he admitted taking a Moduretic tablet on

21 January 2003 the day before the sample was provided. In an initial public statement after he was informed of the positive result and in his initial statement prepared for this hearing he referred to only taking that one tablet. Subsequent information from ASDA revealed that in the sample collected on 12 December 2002 the initial screening showed a presumptive positive reading for those same two drugs, but Dr Kazlauskas the director of the Australian Sports Drug Testing Laboratory said the data did not meet the laboratory's required quality criteria to report a definite positive result. However, he said in oral evidence to the committee that he believed the drugs in question were present in the sample.

It is unfortunate that it was not until the letter dated 14 February 2003, posted 19 February 2003, from ASDA that Warne was notified that the result of the sample of 12 December 2002 was "negative".

When Warne gave evidence he conceded he had taken a Moduretic tablet on one earlier occasion, probably associated with a public appearance after one of the test matches, probably the one in Perth. Given the extreme vagueness of Warne's evidence and some inconsistencies which will be referred to later, the committee has grave doubts that it has full information as to the extent that Warne used Moduretic prior to providing the sample on 22 January 2003.

The following provisions of the ACB Anti-doping Policy are relevant. Clause 2.1 provides -

"The ACB condemns the use of performance-enhancing drugs and doping practices in sport. The use of performance-enhancing drugs and doping practices is contrary to the ethics of sport and potentially harmful to the health of athletes.

The only legitimate use of drugs in sport is under the supervision of a physician for a therapeutic purpose (see Clause 4.4)".

Clause 2.2 provides -

"The ACB aims to prevent the use of performance-enhancing drugs and doping practices in cricket by

- (a) imposing effective sanctions on persons who commit doping offences; and
- (b) educating and informing persons about drugs in sports issues; and
- (c) supporting the drug-testing programs and education initiatives of ASDA and other testing authorities".

We interpolate that the distinction should be noted in those clauses between performance-enhancing drugs and doping practices. Relevantly, Clause 4.1 provides -

"A player commits a doping offence if

- (a) a prohibited substance is present within the player's body tissue or fluids unless
 - (i) the player uses the prohibited substance for a therapeutic purpose (see Clause 4.4); or
 - (ii) there are exceptional circumstances (see Clause 4.5).
- (b) the player uses or takes advantage of a prohibited method unless
 - (i) it was for a therapeutic purpose (see Clause 4.4); or
 - (ii) there are exceptional circumstances (see Clause 4.5).

Appendix A lists prohibited substances and the list includes diuretics. It also provides that prohibited methods include pharmacological chemical and physical manipulation. Under the list of diuretics in the schedule one finds Amiloride and Hydrochlorothiazide. There is then a definition of prohibited method. The

relevant provision for present purposes is -

"Pharmaceutical, chemical and physical manipulation is the use of substances and of methods which alter, attempt to alter or may reasonably be expected to alter the integrity and validity of samples used in doping controls. These include, without limitation, the administration of diuretics".

The paragraph also includes the statement -

"The success or failure of the use of a prohibited substance or method is not material. It is sufficient that the said substance or procedure was used or attempted for the infraction to be considered as consummated".

The evidence establishes that a diuretic is a drug designed to reduce the amount of fluid in the body by precipitating the passing of urine. All the medical evidence points to the fact that a diuretic would not be performance enhancing for a cricketer. If anything it may have a contrary effect. The reason and the only reason why it is a banned substance for a cricketer is that it is a masking agent. That is, it alters or is reasonably expected to alter the integrity and validity of samples used in doping controls. Because of its effect on excretions from the body it can mask, for example, the fact that the subject has used an anabolic steroid. If the diuretic is present it is often impossible for drug-testing procedures to determine whether or not anabolic steroids have been taken.

Properly construed, the provisions of the anti-doping policy mean that the use of a diuretic is a prohibited method. It is for that reason that Clause 8.1 refers to a prohibited method and does not specifically refer to diuretics. Subject to matters discussed later, the presence of a diuretic in the system is sufficient to

constitute the offence of using a prohibited method. That is consistent with the conclusion of the anti-doping committee hearing the matter of G C Rummins (reasons delivered 8 March 2002) which was concerned with the drug Probenecid. Probenecid again is a drug which is banned only because of its masking effect.

Counsel for Warne submitted that there was a mental element in the offence in question. The player had to have an intention to use a prohibited method in imbibing the drug. This is the equivalent of the common law concept of mens rea and it was submitted it applies in addition to the defence of exceptional circumstances expressly provided for in the policy.

The policy constitutes a code with respect to the use by players of drugs. As part of his contract with the ACB Warne agreed to be bound by the provisions of the policy. As indicated above, the use of a prohibited method is defined so as to constitute an offence by the use of the drug subject to the defence of exceptional circumstances. The ACB is not required to prove the player had the specific intent of using the drug as a masking agent before the offence is established.

The real question is whether the defence of exceptional circumstances is made out. The onus of proof is on the player to establish exceptional circumstances (Clause 4.6). The relevant definition of "exceptional circumstances" is that found in Clause 4.5(b):

"Exceptional circumstances exist if the player held an honest and reasonable belief in a state of facts which if they existed would mean that the player did not commit a doping offence".

The evidence clearly establishes that Warne took a

Moduretic tablet. He says he did so believing it was a fluid tablet. He did say in his statement if he had been told it was a diuretic he might have had second thoughts about taking it. He says he took the tablet for cosmetic reasons, hoping it would remove his double chin before facing the media the next day. Both Warne and his mother say he was given a sheet of the tablets from which a few had been used by his mother. That sheet clearly named the drug Moduretic and specified the two constituent drugs. Warne said he could not read that because of the torn flaps from where the tablets had been used but clearly that would not be so. The names were clearly there if he chose to look. He clearly knew it was a chemical compound available only on prescription. He clearly intended the chemicals in the tablet to alter his body integrity at least cosmetically. He made no enquiries about the content of the tablet. He made no attempt to contact the ACB drug medical officer, the Australian team doctor or ASDA before taking it. It could have contained any banned substance.

As already noted by his contract with the ACB, Warne was bound by the anti-doping policy. The evidence clearly establishes that at the commencement of the last number of seasons he had been provided by the ACB with a booklet entitled "Playing Conditions" which contains the policy. He was also reminded of the policy in letters from the ACB. In evidence he said he never read such material.

The ACB and ASDA also run sessions for players at which the anti-doping policy is explained. The evidence clearly establishes Warne attended a number of those

sessions, however, he maintains he did not learn from them the consequences of using diuretics or other drugs, was not aware he could contact medical officers or the ASDA hotline if he had any query about a drug and was not generally aware of the consequences to cricketers of having prohibited substance in their bodies. He claimed only some vague knowledge of the Rummans' case.

Much of Warne's evidence on these issues was unsatisfactory and the committee does not accept he was entirely truthful in his responses to questions about his knowledge of the ACB anti-doping policy. Coupled with that is his vague unsatisfactory and inconsistent evidence about the extent of using a Moduretic. He seemed to say initially he got some of the drug on two occasions from his mother: one tablet was used in December 2002 from one supply and one tablet was used from those supplied in January 2003. But then he specifically said that after his positive test was revealed he had given the remaining tablets to Alcott, the team physiotherapist and two tablets had been used from that sheet.

His mother's evidence was vague and unsatisfactory as to the number of tablets she had given him. Certainly, her evidence was that it was on more than one occasion.

The committee is of the view that the evidence does not establish a reasonable belief such as would found a defence of exceptional circumstances.

It must be recorded that all the medical evidence indicates that Warne's recovery from the shoulder injury sustained on 15 December 2002 was within anticipated

medical parameters. Further, the medical evidence is that given the nature of that injury anabolic steroids would not have hastened recovery. Further, there is no specific evidence of the use by Warne of anabolic steroids or other prohibited substances which would be masked by the diuretic imbibed. But, of course, given the consequence of the use of a diuretic one cannot say categorically that no such substance was used. That must always be the case where there has been the use of a diuretic and that is the very reason for its being prohibited.

The use of the diuretic by Warne was a reckless act totally disregarding the possible consequences. He knew he was taking a chemical substance which would have some effect on his body but he made no enquiry when such enquiries were reasonably available as to whether it was a banned substance. It follows that the offence is proved.

The question then becomes, what is the appropriate penalty? Clause 8.1 provides -

"Where the doping offence involves a prohibited method the anti-doping committee will impose all of the sanctions referred to in Clauses 7.1(a), (b), (c), (d) and (e) and subject to Clause 8.3 those sanctions will apply for a minimum of two years for a first doping offence".

Clause 8.3 provides -

"In an appropriate case the ACB Anti-Doping Committee may vary the period in Clause 8.1 on the basis of any report, statement or evidence provided during the hearing by the ACB anti-doping medical adviser".

The ACB anti-doping medical adviser, Dr Peter Harcourt relevantly reported -

"1. Mr Warne had no performance advantage from the use of Moduretic and may have been at a disadvantage due to the negative effects of diuretics on fluid balance.

2. There is no direct evidence of anabolic steroid use by Mr Warne.

3. In my opinion, Mr Warne's recovery from shoulder dislocation was not unusual and consistent with normal rehabilitation as explained in the reports of Hoyer, James, Alcott and Campbell. In my opinion, Mr Warne did not require anabolic steroids to facilitate his rehabilitation.

4. Spin bowling is almost exclusively a skill sporting activity and Mr Warne would have received no performance advantage from the use of anabolic steroids.

5. There is no medical justification for Mr Warne's use of Moduretic in the stated circumstances.

6. Education of the ACB contracted players is regular and includes reference to the prohibited status of diuretics and the need for all medicines and substances to be checked through the team doctor or the ASDA hotline".

Dr Harcourt also said in oral evidence that Warne cooperated fully in providing statements to him to enable him to furnish his report.

The penalty must be determined having regard to all that was said previously and specifically to the following factors:

1. This was at best for Warne a reckless use of a prescription drug not prescribed for him.
2. No attempt was made to ascertain the content of the drug before taking it.
3. The drug was not taken for a legitimate therapeutic purpose.
4. The taking of the drug resulting in the positive reading was not an isolated incident.

5. The player asserted lack of knowledge of the content of the anti-doping policy notwithstanding attendance at seminars and receipt of copies of the policy.

6. He denied any knowledge of avenues of checking use of medication by sportsmen.

7. He knew it was a fluid tablet and expected it to have some effect on his body integrity.

8. The sanction must recognise that the use of diuretics is a serious doping offence.

The committee is cognisant of the impact of any suspension on Warne's earning capacity not only directly from playing cricket but also indirectly from sponsorships. However, the committee is of the view that for a cricketer the basic sanction must always be in the form of a suspension from playing. That is not to say that the financial consequences are an entirely irrelevant consideration.

Having regard to Dr Harcourt's report, particularly the fact that there was no performance enhancement and no direct evidence of use of an anabolic steroid, the committee is of the view that the penalty should be varied as provided for by Clause 8.3.

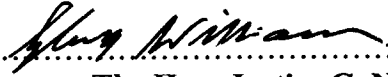
Deliberation on the penalty has proven to be the most difficult aspect of the committee's considerations and a number of possible sanctions have been anxiously considered.

In the circumstances outlined in these reasons the committee imposes on player Shane Keith Warne the sanctions referred to in Clauses 7.1(a), (b), (c), (d) and (e) for a period of twelve months to date from 10

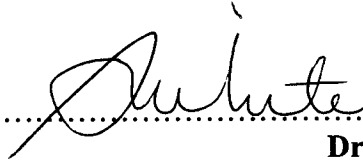
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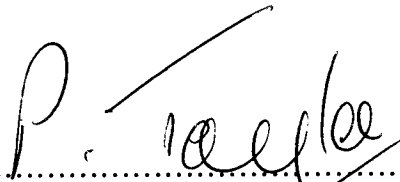
27 February 2003



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The Hon. Justice G. N. Williams
Chair Anti-Doping Committee



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Dr Susan White
Member



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Mr Peter Taylor
Member