

RUGBY FOOTBALL UNION

APPEAL PANEL HEARING

RFU v LEE THOMAS

JUDGEMENT OF APPEAL PANEL

Venue Holiday Inn Bloomsbury on Thursday 1st May 2008

Panel Members

Jim Sturman QC, Chairman
Julian Morris
John Doubleday

In attendance

Bruce Reece - Russel, RFU
Liam McTiernan, RFU

Stuart Denny QC (legal representative for the player)
Quentim Smith, Sale Sharks
James Jennings, Chief Executive Sale Sharks

Nick de Marco counsel for the RFU
Kitty Arbuthnot, RFU

1. On 1/5/08 we heard the appeal of the player against his finding of guilt on a single charge contrary to rule 5.12, in that he was guilty of foul play when he struck Shaun Berne in an incident in about the 20th minute of the game between Sale Sharks and Bath played at Edgeley Park on 28/3/08. At the hearing we dismissed the appeal against the finding of guilt but indicated that we would reduce the sentence, these are the reasons for our decision.

2. In relation to the finding that the charge was proved the player appealed in relation to matters of interpretation of the rules that amounted to a challenge to the jurisdiction of the RFU to bring the proceedings in the first place, as well as an appeal on the merits of the case. In so far as the sentence was concerned the player appealed on the basis that the ban was too long because the panel had erred in selecting the entry level, alternatively that the sentence did not reflect the mitigating factors.

Procedural history

3. Various procedural points were taken on behalf of the player in the course of the proceedings against him prior to the finding of guilt at Brighouse.

4. On 8/4/08 the disciplinary panel that had been convened had been adjourned as a result of the player not having seen the video of the incident or any medical evidence

5. On 16/4/08 the player appeared before the panel which had reconvened after the abortive hearing on 8/4/08, the panel was chaired by Antony Davies, Dr Barry O'Driscoll and John Brennan also sat. The case was heard at The Holiday Inn in Brighouse. 2 Preliminary matters were raised by Mr Hayton who then represented the player, he put forward several arguments: -

- (1) He argued that the Regulations when properly construed only allowed the citing officer to cite where an independent video disclosed foul play.
- (2) The provenance of the video was disputed.
- (3) It was also argued that the video did not disclose foul play in any event,
- (4) It was submitted that the only evidence was the complaint of the aggrieved player and that could not found a charge under the rules.
- (5) Further, only the PCO could cite in any event and the only evidence he was entitled to take into account was the video.
- (6) The Regulations (Para 4) required a citing to be brought to the attention of the RFU disciplinary Manager within 48 hours of the conclusion of the match.

6. The panel rejected these arguments save for the last point (6), where the Chairman stated (paragraph 23 of the judgement of 17/4/08) that the panel “reluctantly” agreed with the submissions made on behalf of the player. The Chairman indicated that in the absence of the player deciding that he was happy to waive the time limit the panel would be minded to refer the matter to the RFU disciplinary officer for him to consider disciplinary action.

7. On 20/4/08 HHJ Blackett, RFU Disciplinary Officer, having considered the ruling of the Disciplinary Panel came to the conclusion that in fact there were exceptional circumstances, but in any event any procedural flaw that may have existed on a rigid interpretation of the Regulations could be surmounted (for the good of the game) by bringing a charge under Rule 5.12 of foul play being conduct prejudicial to the good of the game. The Disciplinary Officer commented (Document 13 of the bundle before us at the appeal) that “for the integrity of the game” the citing was required to proceed. We agree wholeheartedly with that sentiment.

8. On 22/4/08 the Disciplinary Panel reconvened, on this occasion John Brennan was replaced by Cliff Barker as the third panel member. The case proceeded as the consideration of a charge of misconduct contrary to Rule 5.12. An application to adjourn the hearing to allow the player’s Club to appeal the Disciplinary Officer’s ruling was rejected. At page 3 the Chairman remarked that the panel were “disappointed and frustrated with the way Sale Sharks have chosen to conduct their player’s case, seeking postponement and prevarication rather than allowing us to adjudicate on the substantive merits of the case”

9. Some, but not all, of these technical submissions were pursued before us on appeal. The decision of the players lawyers to take such points does not in any way aggravate the offence (on 22/4/08 the Chairman had remarked that it was “undoubtedly their entitlement” to take such an approach), where there are arguable procedural flaws in the rules and regulations it is part of a conscientious lawyer’s duty to his client to advise that such issues exist. Of course a player can choose not to take any such procedural points and to simply allow the disciplinary panel to consider the merits of the case, such an action may afford a player greater mitigation in the event that he were to be found guilty than would be available at the end of a hard fought legal battle, but a player cannot receive a greater sentence for choosing to fight a case using every available argument that his lawyers deploy.

10. The evidence adduced before the Disciplinary Panel was from the nominated citing officer (Peter Colston) who confirmed that his citing was based upon the letter of complaint from Bath and not on any examination of the video. The dvd was considered, Shaun Berne gave evidence and so did Mike Tremlett. All of the witnesses gave evidence via telephone link. Their evidence is summarised in the judgement of the original panel and in the course of the appeal we have not been persuaded that any of the findings of fact that led to the finding of guilt should be interfered with. We adopt the assessment of the panel at first instance having not been persuaded that their summary of the evidence was in any way incomplete or flawed.

11. Mr Thomas gave evidence in support of his own case, that evidence is set out at pages 13 and 14 of the judgement of the Disciplinary Panel. Once again we adopt that summary having not been addressed on the basis that it was incomplete or flawed.

The appeal

12. The first issue we had to decide was whether or not the case should proceed by way of a full “de novo hearing”. The relevant regulation is set out at Rule 11.7.3. The rule states *“If in advance of the day of the hearing itself, the Appellant makes submissions requesting a re-hearing of his case, and the independent lawyer or Chairman considers it appropriate, a de novo hearing may be held. This would normally only be the case where new evidence arises.”* The notice of appeal did not explicitly request a de novo hearing, no new material was available, and the first time the RFU disciplinary secretary was notified that it was intended to seek a de novo hearing was on the morning that the appeal was to be heard.

13. We had no hesitation in concluding that the application for a de novo hearing was out of time, and was not based on any new evidence. In those circumstances we rejected the application for a de novo hearing and ruled that the case should proceed as a review of the decision at first instance, with the burden on the appellant to show that on the balance of probabilities the decision was wrong in accordance with Rule 11.5.1. We wish to make it clear that IF any new evidence had been available we as a panel would not have held the technical failure to apply in time against the player, however that should not be taken as a decision that in any way binds appeal panels that sit hereafter.

Jurisdiction

14. The second preliminary point was the argument on behalf of the player that there was no jurisdiction to consider the charge in all of the circumstances. It was contended that as the case had commenced as a citing, the disciplinary officer – once the procedural flaw in relation to time limits had been drawn to his attention – could not issue a charge under Rule 5.12 that related to “foul play” as “foul play” did not fall within the definition of “misconduct” (definitions are at page 111 of the RFU handbook, with 7 examples at page 119. In effect the submission advanced was that an offence could be “misconduct” or it could be “foul play”, but it cannot be both. Mr Denny submitted that the words of the regulations made it clear that it was “plainly intended” that this was to be the case. With respect, we disagree. Such an interpretation would be wholly inconsistent with the framework of the rules and the intention behind the disciplinary regulations, a clear desire to ensure that foul play and other misconduct is dealt with through a speedy, efficient and just disciplinary process administered by the guardians of the game in England. We have no doubt that Rule 5.12 was designed to ensure that a miscreant does not avoid guilt on a technicality, by doing so the rule serves to protect the integrity of the sport. Mr de Marco submitted that once rule 2.5. 4 (b) was considered it was quite clear that the Disciplinary Panel had jurisdiction, Rule 2.5.4 (b) did not expressly exclude citings and if Mr Denny’s submission was correct the rule would have.

15. We agree with Mr DeMarco and have no hesitation in concluding that the jurisdiction argument fails. Whilst Mr Denny’s arguments may have had some superficial attraction as technical points of construction, looking at the intention behind these rules we reject the defence submissions.

The merits on the facts

16. We were shown the video and also had the opportunity to review it ourselves. It is fair to say that the video is inconclusive in itself, but that was not the end of the evidence. The panel at first instance also had the benefit of the oral evidence from Shaun Berne and Mr Tremlett. We were careful to bear in mind that accidents can happen on a rugby pitch, but the nature of the impact, the injury suffered (to a player who was wearing a gum shield) and the reaction of the injured player coupled with the evidence of Mr Tremlett who was sat in the stands leaves us in no doubt that the appellant has failed to discharge the burden that rests upon him on appeal.

Our decision on sentence

17. Mr Denny submitted that this was a “low level” entry point case. We reject that submission. However, we do agree with Mr Denny that it is not possible to conclude on the evidence that the blow was deliberate rather than reckless. Further, we agree that it is not possible to say that the blow was intended to, or even reckless as to whether or not the injury that was in fact suffered was caused.

18. The finding of the original panel that the failure to apologise in some way aggravated the offence is one with which we disagree. It may well be that the player was acting on legal advice, bearing in mind the original panel were clearly (from the terms of their judgement) somewhat irritated by the conduct of the case it would not be fair to lay the blame for what may have been the “tactical” decisions of the legal advisors at the feet of the player.

19. We agree with the Disciplinary panel that this was a “top end” offence, with a range of sentence therefore available of between 9 and 52 weeks. However, we have carefully scrutinised the approach of the original panel to the sentence imposed and after careful consideration concluded that the sentence of 14 weeks was too long. Whilst this was an offence that carried serious consequences to Shaun Berne, it is all too easy to imagine a worse case. This was not a blow to the head of a player lying trapped in a ruck, there did not appear to be any element of pre-meditation or evidence of seeking revenge, the player had a good disciplinary record (one yellow card for killing the ball being so insignificant in the context of this offence as to lead us to treat the player as having an unblemished record) We are of the view that the original panel may have started at too high a level in terms of the number of weeks prior to adjustment for the aggravating and mitigating factors. Doing the best we can in our judgment to do justice to the player and to deter others from similar offences we have concluded: -

20. The player shall be banned for a period of ten weeks. The periods concerned shall be between 22nd April and 17th June and then between 22nd August and 4th September. He is free to play again on 5/9/08.

The player is ordered to pay 500 pounds in costs for the appeal.

The appeal against the finding of guilt is dismissed, the appeal against sentence is allowed to the limited extent set out above.

James Sturman QC,
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13/5/08