

RUGBY FOOTBALL UNION

DISCIPLINARY HEARING

At: Holiday Inn, Coventry M6, Junction 2

On: Monday 18th January 2010

JUDGMENT

Player: Ben GERRY

Club: Stourbridge

Match: Stourbridge RFC v Redruth RFC

Venue: Stourton Park, Stourbridge

Date of match: 14 November 2010

Panel: John Brennan (Chairman), Geoff Payne, Andrew Lockhart (collectively "the Panel")

Secretariat: Liam McTiernan

Attending in person: Ben Gerry - the Respondent
Carl Wythes - Mr Gerry's representative
Neil Mitchell – Stourbridge's director of rugby

Attending by phone: David Penberthy - Redruth's director of rugby
Sam Heard - Victim

Witnesses: Craig Bonds (by phone) - a Redruth player
Ben Gerry - the Respondent
Steven Mann - Witness (Stourbridge's club doctor)

Other Evidence: The official DVD footage of the match. Amateur DVD footage recorded by a parent of one of the Stourbridge players.

Decision

1. The citing complaint was dismissed.

The Citing Complaint

2. The citing complaint arose from an incident in a National Division 1 league match between Stourbridge and Redruth which occurred on Saturday 14 November 2009 at Stourbridge's ground.
3. Redruth alleged that Mr Gerry was guilty of an act of foul play contrary to law 10(4)(a) namely, "a player must not strike an opponent with the fist or arm, including the elbow, shoulder, head or knee(s)".
4. The citing complaint dated 24 November 2009 stated: "The alleged act of foul play ... consisted of Ben Gerry, Stourbridge's No 2, throwing a punch and connecting with the head of Redruth No 3 Sam Heard."
5. During the course of the hearing Mr Penberthy sought to persuade the Panel that Mr Gerry aimed a deliberate punch at Mark Bright, Redruth's No. 8, which missed and, in the result, struck Sam Heard, Redruth's tight-head prop. It was, therefore, a case of transferred malice.

The Common Ground

6. The following was common ground.
7. The incident in question occurred in or around the 30th minute of the first half.
8. Stourbridge kicked off. Mark Bright, Redruth's No 8, caught the ball. He ran forward. Shortly thereafter, Ben Gerry and other Stourbridge players sought to tackle him. In the event, Mark Bright shrugged off Mr Gerry's tackle, stayed on his feet and sought to drive forward. By this time, a loosely formed maul developed including several forwards from both sides. In the meantime, Mr Gerry got back to his feet and sought to join the maul.
9. Immediately before he joined the maul, Mr Gerry's right hand and elbow were above his right shoulder. His right arm was cocked like a swimmer doing the front crawl at the point just before the arm enters the water.
10. At or about the moment when Mr Gerry joined the maul, he brought his right arm down at speed.
11. Shortly thereafter, Mr Heard fell to the floor.
12. Mr Gerry and Mr Heard were in close proximity to each other and to several other players from both teams at the point when Mr Heard fell to the floor.

Procedural Matters

13. Redruth's representative and witnesses intended to participate in the hearing by phone.
14. Unfortunately, it proved impossible to effect a clear telephone connection between the speaker-phone in Coventry and the speaker-phone Redruth intended to use.

15. In the event, Mr McTiernan and Mr Mitchell generously offered the use of their mobile phones so as to enable a connection to be made to the phone Redruth intended to use.
16. The result was not entirely satisfactory. At the invitation of the Panel, Mr Penberthy was encouraged to inform the Panel if he was unable to hear what was being said in Coventry. To that end, he was given another mobile number to ring just in case he was not able to make himself heard from the other end of the phone. It proved necessary for him to do so on two occasions.
17. Redruth did not invite the Panel to adjourn the hearing. This was understandable. It had been difficult to identify a date for the hearing that was convenient to all parties. The hearing had already been adjourned once before. The case turned on the recollection of fine detail. Those present in Coventry were well able to hear both what Mr Penberthy said during the course of his opening, cross-examination and closing submissions and what Mr Bonds said during the course of his evidence. Anything which Mr Penberthy did not hear could be repeated.

The Competing Cases

18. Redruth's case was that Mr Gerry threw a punch at Mr Bright. It missed because Mr Bright moved his head at the last moment. The result was that Mr Gerry's fist struck Mr Heard's head.
19. Mr Gerry's primary case was that Mr Gerry made no contact with Mr Heard at all. He said that his right arm was high so as to be better able to reach over Mr Bright and grab the front of his shirt in order to throw him to the ground. Mr Gerry's alternative case was that if any contact was made, it was accidental.

The Issues

20. The Panel approached the citing complaint on the basis that it fell to Redruth to prove on the balance of probabilities that the offence took place as cited (see para 4.12 of Appendix 7 (Citing Procedures) of the RFU Disciplinary Regulations ("the Regulations")).
21. In that connection, Law 10.4(a) was an offence of strict liability (see Note 1 of Appendix 9 (Guidance Issued by the RFU Disciplinary Officer) of the Regulations).
22. In the circumstances, the first and most important issue the Panel had to consider was whether it was satisfied on the balance of probabilities that Mr Gerry struck Mr Heard in the head with his fist as alleged.
23. The Panel took into account all the oral testimony it heard and the official match DVD footage in order to answer that question.

The Evidence and the Finding of Fact

24. It was impossible to state whether Mr Gerry had struck Mr Heard or not from the official match DVD footage. The Panel viewed it many times at actual speed and in slow motion. The unofficial DVD footage filmed by a spectator was of no additional assistance. The Panel could see no material difference between the official and the unofficial footage. They had been filmed from virtually the same point.
25. It followed that in order to prove its case to the requisite standard, Redruth had to persuade the Panel to accept Mr Bonds' evidence that Mr Gerry's punched Mr Heard in the head.
26. Mr Bonds' evidence merited close attention, not least because he had complained to both the referee and Mr Gerry immediately after the incident that Mr Gerry had punched Mr Heard.
27. The panel had no doubt that Mr Bonds was an honest witness. The question was whether he was mistaken or not.
28. Mr Bonds was Redruth's centre. When the kick off occurred, the ball sailed over his head. Anticipating play, he ran back towards his own goal-line and watched play unfold over his shoulder as he did so. He saw Mr Bright, Redruth's No 8, catch the ball and run towards the Stourbridge forwards bearing down upon him. His recollection was that he was on Stourbridge's side of the advantage line when Mr Heard fell to the floor. When he was taken to the DVD footage, he accepted that he was, in fact, on Redruth's side of the advantage line. Mr Bonds was about a third of the width of the pitch away from play when Mr Heard fell to the floor. There were a number of players between him and Mr Gerry, including Mr Heard.
29. Mr Bonds stated that he saw Mr Gerry's arm come down through a gap between the melee of players. He said that he saw Mr Gerry's fist strike the right hand side of Mr Heard's head in the region of his temple.
30. The Panel took the view that, although Mr Bonds was quite sure that Mr Gerry brought his right arm down moments before Mr Heard fell to the ground, he was far less confident whether Mr Gerry had struck Mr Heard. When asked whether he actually saw contact between fist and head, Mr Bonds' evidence was notable for its diffidence. When asked whether it might have been an accident, Mr Bonds was unable to express a view either way. The Panel felt that his evidence was encapsulated by the exchange between him and Mr Lockhart, a Panel member: "Q) Did you see Mr Gerry punch Mr Heard? A) I saw the swinging motion of the arm and I saw Sam Heard fall. Q) Did you see his fist Mr Heard's the temple? A) [Long pause] Yes"
31. When considered within the context of the following evidence, the Panel was not satisfied to the requisite standard that Mr Gerry struck Mr Heard.

32. First, the reliability of Mr Bonds' evidence was open to doubt. The the manner in which he gave evidence on the crucial issue as to whether Mr Gerry had struck Mr Heard was not compelling. The weight that the Panel could attach to Mr Bonds' recollection of events was undermined in two further respects. First, as referred to above, his recollection of his position on the pitch was exposed to be faulty. Secondly, Mr Bonds' recollection was that Mr Heard had been struck in his right temple. However, Dr Mann's recollection was that the only evidence of injury was bruising was on the left hand side of Mr Heard's forehead towards his hair line. The Panel preferred Dr Mann's evidence in this regard, principally because Dr Mann had the advantage of actually examining Mr Heard's injuries whereas Mr Bonds did not.
33. Secondly, there was no evidence that anybody other than Mr Bonds had seen Mr Gerry strike Mr Heard. The telling point about this case is that it would appear that neither the referee, the other match officials, any of the Redruth players (including several players much closer to the action) or any of the spectators saw Mr Gerry punch Mr Heard. When evaluating the significance to be placed upon this it is important to bear in mind that this was not an off-the-ball incident. Most, if not all of those referred to above, would have had Mr Gerry in their line of sight. If it was true that Mr Gerry threw a punch at Mr Bright which hit Mr Heard, it is overwhelmingly likely that other people would have noticed it. The Panel was entitled to infer that Mr Bonds was mistaken.
34. Thirdly, Mr Gerry denied that he had made any contact with Mr Heard at all. Mr Gerry was an assured and convincing witness. Mr Gerry was entitled to pray in aid his character. He had played rugby at a high level for many years. He was the Stourbridge captain during the 2008-2009 season. He had recently received the award for the "Best and Fairest" player in a tournament in Manila. He had played for England Counties. The only blemish on his character was a solitary yellow card awarded for a late tackle last season.
35. Fourthly, Mr Gerry had no reason to punch Mr Bright. What is more, the two men knew each other a little. It would be remarkable if a player with Mr Gerry's record had taken it into his head to launch an unprovoked attack on Mr Bright.
36. Fifthly, the DVD footage tended to suggest that Mr Gerry was concerned to join a maul rather than throw a punch.
37. Finally, it was impossible to rule out the possibility that Mr Heard's injury had not been caused by an accidental collision with another player.
38. In those circumstances, the Panel found as a fact that Mr Gerry did not strike Mr Heard.
39. Accordingly, the citing complain was dismissed.

40. The Panel express the hope that its investigation and adjudication upon this issue will serve to enable all parties to put this unfortunate incident behind them. It only remains for the Panel to wish the unfortunate Mr Heard well and hope that he has made a full recovery from his injuries.

25 January 2010

John Brennan