

context, means to bring down one's foot or a downward blow with the foot.

5. A prima facie case of kicking was made out on the face of the available evidence, not least the DVD footage. It shows M. Azam striking out with his foot whilst he is lying on the ground. That is not the same as finding that the charge was proved; put another way we were not at that preliminary stage being asked to uphold the citing just (as it were) to say whether there was a case to answer on the preferred charge. In our judgment, there was. Accordingly, we declined *at that stage* to amend the charge.
6. Once informed of our decision, Mr Burgess took time to consult in private with the Player.

Charge and Plea

7. Oliver Azam then pleaded guilty to the charge of kicking an opponent contrary to Law 10(4)(c), during the Guinness Premiership match played between Saracens RFC and Gloucester Rugby on 27 September 2009. In light of his admission, we upheld the citing.
8. By admitting the offence, the Player accepted that he kicked the opponent in question, Steve Borthwick ('SB'). He denied that he kicked him deliberately to the face.

The Citing Complaint

Facts

9. The incident occurred in the 13th minute of the first half. The citing report dated 29 September 2009, drafted by the Citing Officer A D Lanaway read:

“Following a Gloucester restart, No4, Steve Borthwick of Saracens collects the ball; goes to ground after a tackle and a ruck forms. No2 of Gloucester, Olivier Azam rucks vigorously from the right hand side and is eventually driven backwards by Saracens No5 Mouritz Botha, out of the ruck and so falls to the rear of the mass of players, on his own side, contesting the ball. No14 of Saracens, Noah Cato rolls out of the way and rejoins his side. The ball is now at the back of the Saracens ruck and is being observed by the referee. Azam is lying on his left side, he rolls back, rotates his hips slightly and raises them, lifts his right leg and kicks out at a player on the ground, Borthwick. Saracens No2, Fabio Ongaro, closest to the incident, remonstrates with Azam and follows him after a penalty has been awarded. The penalty was not awarded for this offence. He and two other members of the Saracens party have supplied eye-witness statements and these are available. The medical report

from the Saracens Medical co-ordinator indicates that Borthwick suffered an injury to the right eye region and the report is available. Two DVD views have been used in reaching this opinion. One from the side, supplied by Sky and one from the rear (Gloucester end). Discussion with the match official, Martin Fox, took place today, 29th September at 1240hrs. His view is that the ruck formed and Azam forces the ruck. His viewpoint is now towards the ball at the base of the Saracens ruck. At the time neither he nor his assistant are aware of Azam's subsequent actions."

10. Mr McEvilly presented the citing by taking us through the DVD clips of the incident. There were two: one from Sky and the other, 'Insight' footage. In doing so he spoke to the written submissions he circulated during the morning of the day of the hearing. It was clear from his written and oral submissions that the 'case' being advanced on behalf on the RFU was not the 'neutral' content of the citing report, but rather a specific allegation that the Player deliberately kicked SB in the face.
11. This prompted an immediate and robust complaint from Mr Burgess that, in effect, he was being ambushed and was now having to meet a different case than the one contained in the citing report. We gave him time to reflect and I made it clear that if he wished to have further time or an adjournment he need only ask for it. After time reflecting and considering his position in private and with the Player, he indicated a preparedness to continue wishing only to "register his concern" that they did not receive the submissions until the morning of the hearing.
12. Other evidence was supplied to us in the form of an email from Mike Hynard of Saracens RFC. It purported to set out accounts from three witnesses none of whom was available to give live evidence to the Panel. The weight to give such (hearsay) evidence is a matter for the Panel. *Regulation 7.1.7* states whenever reasonably possible witnesses should attend the hearing in person. *Regulation 7.1.8* states written evidence is "equally valid as oral testimony if it is not challenged". The Player challenged this evidence. *Regulation 7.1.9* reminds one to treat "with caution" hearsay evidence.
13. In a case as serious as this, where direct evidence is available from two sources, and with there being no explanation for the absence of the three witnesses, we placed no weight on their disputed evidence. That was to the Player's advantage.
14. We heard from SB. He was not readily available at what might be considered the natural time so we proceeded to hear from Mr Burgess and the Player. We also did so because Mr Burgess wished us first (i.e. before we heard from SB) hear from M. Azam.

15. Notwithstanding the content of the Citing Report, no medical evidence or report was placed before us. Since we heard from SB himself, we took and accepted from him the extent of the injury caused by the act of foul play. In the event, it was not disputed

Player's Case

16. Mr Burgess invited us first to hear from the Player. M. Azam immediately apologised for his actions. He told us that he did not deliberately kick SB in the face. He felt aggrieved (my word) about the way the press had portrayed him since the incident.

17. He joined the ruck and SB, who was lying on the ground, grabbed his left leg in the region of his calf. He went to ground and was lying on his left side. SB grabbed his left knee and then changed his grip, grabbing his left ankle. He felt a sharp pain as his ankle/foot was twisted by SB and kicked out to "stop that pain, to get free".

18. Before us, M. Azam got onto the floor of the hearing room and demonstrated what he did. In short, lying on his left side, right leg on top of his left, he raised his right leg, bending it at the knee and then moving it down such that his right foot made contact with his left ankle. He described it to us in this way: a downwards pushing movement of his right foot, as if trying to push off his left shoe (with his right foot).

19. When questioned, he denied that he could see SB's head. He was not looking and in any event, his right arm would, had he looked, have blocked his view. He said he was trying to "kick off" whatever was gripping him. He was not, he insisted, kicking out at SB's head or face. He would not and had never done such a thing.

20. Mr Burgess then took us through the DVD footage. Later, I comment upon and commend his analysis. It was masterly and impressed each of us. The whole incident lasted two seconds, he said. Initially, when M. Azam was standing involved in the ruck, SB grabbed his left leg. Once the Player was on the ground, SB can be seen to take hold of M. Azam's left foot with his right hand. He then released that grip, and again took hold (with his right hand) of the toe end of the same left foot. He then pulled that foot up and over his own body (he was lying on his back); his right hand is then holding M. Azam's left boot close to and in front of his (SB's) face.

21. The action of pulling and twisting left foot, twisted M. Azam's left leg and in consequence his hips and body are raised off the ground; he moves towards SB going in the direction of the pain. It is then, once he

is off the ground (remembering that his left boot is in front of SB's face and being held by SB) that he kicked out and contact with the face was made.

22. He said that M. Azam was not looking at or in the direction of SB when he struck out with his foot. He submitted that contact with his face was "accidental". He also submitted that whilst the Panel might conclude that the Player's conduct was reckless "in lashing out with his leg", there was a significant difference between that and intentional foul play.
23. We received and read an unsigned statement from Mr Phil Vickery, dated 6 October. Therein he commented in favourable terms on M. Azam's character and purported to give his opinion of the incident having "watched it on TV". We had regard to what he had to say about M. Azam and took that into account when considering his character. As to the incident, we treated it exactly the same as the other untested written evidence.

Steve Borthwick

24. Helpfully, SB made himself available and we heard him by telephone. He said he realised M. Azam's standing foot was by his head and so grabbed it, to ensure he was not kicked. Once M. Azam was on the ground, his (left) foot was by his (SB's) head so he took hold of it, again to ensure he was not kicked. The next thing he knew, he felt a stud in his eye. He denied taking hold of M. Azam's boot and twisting it. When questioned by Mr Burgess he said he could not recall doing so, had not done so "to [his] knowledge" and had not seen the DVD footage.
25. He said he needed three stitches in his eyelid. His eye closed immediately, and he was admitted overnight to an eye hospital. On examination his eyeball was not "tracking well" and there was bruising, swelling and internal bleeding. There was no fracture, but the eye was closed and remained so for some days. He experienced numbness above and below the eye. At the time of the hearing, there remained a degree of bruising, but he described the eye as "healthy".

Sanction

Player's Submissions

26. Mr Burgess invited us to the view that on his analysis the Player's action was a "reasonable, spontaneous, and proportionate" response to

his leg being grabbed and twisted. He submitted that SB's conduct amounted to "severe provocation".

27. He invited us to say that the injury caused was such as to keep SB out if the game for one week, submitting that he had been rested for this forthcoming weekend and would be fit to play for Saracens against Toulon on 15 October.
28. In those circumstances, he invited us to conclude that the appropriate entry point was mid range.
29. He submitted there were no aggravating factors. M. Azam has played over 190 times for Gloucester and is a capped international for his country, France.

Decision

Factual Finding

30. The Player accepted committing the act of foul play for which he was cited, namely kicking an opponent. The important factual issue for us to resolve was whether it the kick to the face was deliberate.
31. Our on analysis of the footage, assisted by Mr Burgess we accepted on the balance of probabilities (*Regulation 6.5.1*) that M. Azam's foot was grabbed and twisted such that it was off the ground and close to and above SB's face. We accepted further that M. Azam kicked out in the direction of that foot and did so, as he said, in an effort to free himself. He kicked out deliberately. However and unanimously we were not persuaded to the requisite standard that he intended to kick SB in the face or head. He intentionally or deliberately kicked out but did not do so aiming for SB's head or face¹.

Seriousness

32. Applying our factual findings, we undertook an assessment of the act of foul play (*Regulation 8.2.5*). Unanimously we agreed
 - a. It was a deliberate kick with the foot, but one which was not aimed intentionally at the head.
 - b. As to the gravity of the Player's actions, it was boot to head.
 - c. It was a retaliatory act to his being held in the way we found.

¹ For an example of a similar decision see the decision of the ERC Appeal Committee in *Jerry Flannery*, 6 February 2008

- d. The act of foul play caused a not insignificant injury, in consequence of which the injured player left the field, received treatment, spent time in hospital and was unfit to play the following week.
 - e. It had an effect on the game in that a number of Saracens players reacted immediately to the Player's conduct.
 - f. The opposing player was to some extent vulnerable and was struck to the face.
 - g. It was a completed act of foul play.
33. The assessment of the majority was that the above factors merited a top end entry point.
34. Pursuant to Appendix 2 of the Disciplinary Regulations (as amended by the RFU's incorporation of the iRB Council Decision of 28 July 2009 and its Notice of Alteration of Regulation 17 dated 29 July 2009), the top end entry point for kicking is 12+ weeks.
35. *Regulation 8.2.6* requires a further assessment of the appropriate entry point between 12 and the maximum of 52 weeks. That we did, having regard to the guidance in *Appendix 9*, more particularly *RFU Guidance Note 3*. Bearing in mind the nature of the injury and the player reaction, we fixed the starting point at 16 weeks.
36. There were no aggravating features within Regulation 8.2.7.
37. As for mitigating factors, we gave him credit for his admission. His record is not clean, indeed he had just returned from a 9 week suspension for another act of foul play, which occurred towards the end of last season. His age and experience we considered neutral. He behaved properly before us. His regret and remorse we accepted as genuine. Our assessment of the mitigating factors led us to reduce the appropriate period of suspension from 16 to 12 weeks.
38. Accordingly, M. Azam is suspended from playing rugby union for a period of 12 weeks. His Club had taken no action pending resolution of the citing and so the suspension starts from the date of the hearing. The suspension will run from 6 October 2009 up to and including 28 December 2009. He is free to play again on 29 December 2009.
39. We commend Mr Burgess for the way he presented the Player's case. I cannot recall a better analysis of DVD footage. After I announced the majority decision, and at a time when he must have felt acute disappointment, M. Azam thanked me for the way I had conducted the hearing, especially when dealing with the alleged 'ambush'. That good

grace was entirely in keeping with the way he conducted himself before us. We did not find that he kicked SB intentionally to the head.

Costs

40. Costs of £250.00 are awarded against each Player/club.

Right of Appeal

41. The Player is reminded of his right of appeal against this decision which must be lodged by 1200 hrs Friday 9th October 2009.

A handwritten signature in black ink, appearing to read 'Christopher Quinlan', written in a cursive style.

Christopher Quinlan (Chairman)
7 October 2009