

ICC v Kagiso RABADA

Decision of Judicial Commissioner – Michael Heron QC

28 March 2018

Counsel for ICC: Ms Sally Clark, ICC Senior Legal Counsel assisted by Adrian Griffith, ICC Senior Manager, Umpires and Referees

Counsel for Mr Rabada: Advocate Dali Mpofo SC, Advocate Ms Kerusha Pillay, and instructing lawyers, Mr David Becker and Mr Matt Kemp of Becker & Associates

Introduction and Match Referee decision

1. Kagiso Rabada of South Africa was charged with a Level Two offence for his conduct in the second test match against Australia at Port Elizabeth on 9 March 2018. The incident was reported by the Umpires to the Match Referee and described as “inappropriate and deliberate physical contact with a player in breach of Article 2.2.7 of the ICC Code of Conduct for Players and Player Support Personnel (**the Code**).”
2. Mr Rabada denied the offence and indicated he wished to contest the charge at a full disciplinary hearing. That hearing was held by the Match Referee on 11 March 2018.
3. The Match Referee heard evidence from two of the Umpires (one was unavailable) and Mr Rabada (amongst others). He did not hear evidence from Mr Smith. On 12 March, the Match Referee found Mr Rabada guilty and imposed a sanction of 50% of the applicable match fee. As a result, Mr Rabada received 3 demerit points which in addition to the demerit points he had already accumulated meant that he would be suspended for the next two test matches between South Africa and Australia.¹ I note for completeness that the Match Referee imposed the minimum penalty available for such an offence (and that the demerit points automatically followed from that minimum penalty).
4. The Match Referee stated in his summary reasoning that he:

“... was satisfied that the contact made by Rabada and Smith, in my judgement was inappropriate and deliberate. There was the opportunity to avoid contact and therefore saw no evidence to support that it was accidental.”
5. Mr Rabada appealed against that finding and lodged the required notice of appeal under Article 8.2.

¹ Article 7.6 of the Code

6. On 15 March 2018 I was appointed as Judicial Commissioner under Article 8.2.3.1² to hear the appeal. The Match Referee supplied the required written statement setting out the relevant facts as he saw them.³
7. The statement set out the key features of the conduct which in the Match Referee's view led him to conclude Mr Rabada was guilty. The Match Referee saw two features as critical. First, Mr Rabada when asked by the Umpire on the field whether there was any contact said no. Second, the Match Referee concluded that when Rabada came close to Smith, he dipped his shoulder just before impact which brought him to the conclusion that Rabada was "readying for contact". This to the Match Referee showed intent.
8. In his written statement the Match Referee stated:

"Never in my 14 years of Refereeing have I seen such animosity between two teams that was mainly a result of the debacle in the previous Test in Durban. This I have no doubt is a contributing factor to the events that occurred under this COC charge."

9. The Match Referee further stated:

"Summary:

It is my view, this was another send-off as we have seen before and later in this Test, the bowler getting right into the batsman space [sic] with some loud aggressive shouting - this time Rabada got too close and created the contact.

The dipping of the shoulder raises serious questions of intent.

That he said to the umpire there was no contact and later expressed that he did not feel it in any way, also raises questions."

Procedure

10. The Code requires that I hear and determine all issues arising from any matter which is appealed on a "**de novo**"⁴ basis. That is, I am required to hear the matter over again without being bound in any way by the decision being appealed.⁵ It means that whilst I can have regard to the decision of the Match Referee, I am not bound in any way by it and can hear and consider the evidence afresh.
11. Mr Rabada and the ICC, through legal counsel, agreed that the hearing should take place by way of video conference. I confirmed with the parties in advance that a key issue for

² Being a member of the ICC's Code of Conduct Commission from a country other than those participating in the match, sitting alone.

³ Statement dated 15 March 2018.

⁴ This is a latin phrase which means "from the beginning". In an appellate context it means that the hearing is conducted afresh, without being constrained by the evidence or submissions or findings in the tribunal below.

⁵ Article 8.2.3.3. It further states "*For the avoidance of doubt, the Judicial Commissioner shall have the power to increase or decrease, amend or otherwise substitute a new decision on the appropriateness (or otherwise) of the sanction imposed at first instance, provided that any new sanction must be within the permitted range of sanctions set out in the table in Article 7.3 ...*"

determination was whether the conduct of Mr Rabada was deliberate and that the parties were content for me to judge the evidence by video-conference. In particular, I asked for and received confirmation from both parties that this provided a fair and reasonable opportunity to present their respective cases.⁶

12. The appeal hearing took place by video-conference on 19 March 2018 and ran from NZ 20:00 hours to NZ 02:00 hours on the 20th of March (for the convenience of the parties in South Africa and Dubai).
13. The ICC were represented by Ms Sally Clark, Senior Legal Counsel, ICC and Mr Adrian Griffith, Senior Manager, Umpires and Referees. Mr Rabada was represented by Advocate Dali Mporu SC and Adv Ms Kerusha Pillay, with instructing lawyers Mr David Becker and Mr Matt Kemp of Becker & Associates.

Issues for determination

14. The ICC submitted the only issue for my consideration was whether, on the evidence before me and to my comfortable satisfaction, Mr Rabada committed the offence charged or not, and if so, what the appropriate sanction should be. The ICC submitted that extraneous issues such as whether the Code is applied consistently are irrelevant. Counsel for Mr Rabada submitted that wider issues were relevant including whether the Code was being applied inconsistently in this area and gave examples of other conduct which was comparable which did not lead to a finding of guilt.
15. I agree with the submission of the ICC, that the treatment of other cases is not relevant to the primary issue here and accordingly I have not given any weight to the arguments for Mr Rabada in that respect.

Burden and Standard of proof

16. Article 6.1 and 6.2 of the Code state:

6.1 Unless otherwise described herein, the standard of proof in all cases brought under the Code of Conduct shall be whether the Match Referee or Judicial Commissioner is comfortably satisfied, bearing in mind the seriousness of the allegation that is made, that the alleged offence has been committed. This standard of proof in all cases shall be determined on a sliding scale from, at a minimum, a mere balance of probability (for the least serious offences) up to proof beyond a reasonable doubt (for the most serious offences).

6.2 The Match Referee or Judicial Commissioner shall not be bound by judicial rules governing the admissibility of evidence. Instead, facts relating to an offence committed under the Code of Conduct may be established by any reliable means, including admissions.

⁶ Article 5.2.2 provides that the hearing procedure is at the discretion of the Match Referee provided that the hearing is conducted in a manner which offers the player a fair and reasonable opportunity to (i) present evidence, (ii) address the Judicial Commissioner and (iii) present his/her case. Article 8.2.3.2 states the *provisions* of Articles 5.1.2 to 5.1.11, applicable to proceedings before the *Match Referee*, shall apply *mutatis mutandis* (i.e. with changes deemed to have been made as required to reflect the different context) to appeal hearings before the *Judicial Commissioner*. Those provisions are designed to ensure the hearing is conducted fairly and expeditiously.

17. The ICC accepted that it had the burden of proving the offence to my comfortable satisfaction.⁷ In oral submissions, the precise standard was debated.
18. Mr Mpofu for Rabada submitted the standard in this case was beyond a reasonable doubt, because of the serious nature of the offence alleged. The ICC submitted that the offence was Level 2 and that therefore the standard falls at the lower end of the sliding scale. I accept the ICC submission that in this case I must simply be “comfortably satisfied” which means in this context more than a balance of probabilities but less than beyond a reasonable doubt. In that regard I adopt a similar approach to that applied by the Court of Arbitration of Sport.⁸
19. In my view it should be reasonably clear that the elements of the offence are satisfied from the evidence called (and reasonable and proper inferences available) before I can find the player guilty.

Interpretation of the Code and relevant provisions

20. The ICC submitted that English law governs the Code,⁹ and therefore it is to be construed in accordance with the following principles:
- a. The words in one provision should be construed in the context of all the relevant provisions, not in isolation.¹⁰
 - b. The words should not be given an unduly legalistic interpretation, rather, they should be given their natural and ordinary meaning.¹¹
 - c. The words should not be given any unnecessary gloss that changes their natural and ordinary meaning.¹²
 - d. In particular, the words should be interpreted in a manner that gives effect to the objectives underlying the rules, and not in a manner that undermines those objectives.¹³

⁷ ICC submissions paragraph 14

⁸ See <http://www.tas-cas.org/en/jurisprudence/archive.html> for examples.

⁹ Code of Conduct - Article 10.5.

¹⁰ See e.g. *Berger v WADA*, CAS 2009/A/1948, award dated March 2010, para 39(d).

¹¹ See e.g. *Cowley v Heatley* (1986) Times, 24 July [ChD] (Vice Chancellor Brown-Wilkinson).

¹² See e.g. *Korda v ITF Ltd (t/a International Tennis Federation)*, Independent, 21 April 1999 [CA].

¹³ See e.g. *Modahl v The British Athletic Federation Limited*, 1997 WL 1105493, 28 July 1997 [CA] (Lord Woolf), page 7; *R v British Basketball Association ex p Mickan*, 1981 WL 695917, 17 March 1981 [CA] (Lord Justice Cumming-Bruce), page 3.

- e. In addition, a construction that would lead to an unworkable or impractical result should be avoided.¹⁴
21. I accept and apply those principles.
22. Article 2.2.7 of the Code contains an offence of: *“inappropriate and deliberate physical contact with a Player, Player Support Personnel or any other Person (including a Spectator) in the course of play during an International Match.”*
23. The guidance note to Article 2.2.7 states: *“NOTE: Without limitation, Players will breach this regulation if they deliberately walk or run into or shoulder another Player.”*
24. The ICC submitted these provisions are clear. It is a breach of the Code to have inappropriate and deliberate physical contact with another player. An example of such an offence is, as per the guidance note, where a player deliberately walks or runs into or shoulders another player.
25. The ICC further submitted two key principles underpin Article 2.2.7 of the Code and which must be borne in mind when considering the Appellant’s conduct.
- a. First, cricket is a non-contact sport. The ICC submitted that, **any kind of inappropriate physical contact, unless purely accidental, is prohibited**. The seriousness which the ICC places on inappropriate physical contact is demonstrated by the fact that the offence is constituted as a level 2 offence (as opposed to level 1). There are four levels of offences.
 - b. Second, the principle that players should afford a dismissed batsman respect. A batsman should be left alone after being dismissed and should not be provoked. This principle is emphasised by virtue of a specific offence included in the Code to address it, namely Article 2.1.7, the so-called send-off offence.¹⁵ The ICC submitted the treatment of a dismissed batsman immediately after his dismissal is seen as a special case and one in which greater respect should be shown to the player.
26. The ICC submitted that both of these principles derive ultimately from the Spirit of Cricket which underpins the game and which is meant to ensure that cricket is always played in a truly sportsmanlike manner. A key facet of the Spirit of Cricket is the need for respect.
27. I accept and apply these principles in this case, with one proviso.
28. The proviso is that I do not agree with the ICC submission that **“any kind of inappropriate physical contact, unless purely accidental, is prohibited”**. The offence in 2.2.7 prohibits

¹⁴ See, e.g., *Berger v WADA*, CAS 2009/A/1948, award dated March 2010, para 39(c).

¹⁵ The ICC submitted this Article provides that it is an offence to use language, actions or gestures which disparage or which could provoke an aggressive reaction from a batsman upon his/her dismissal, including, by way of an example, excessive celebration directed at and in close proximity to the dismissed batsman. The reason that this particular situation has been drawn out in the Code may be due to the emotionally charged nature of such passages of play, or it may derive from the fact that there is a particular imbalance of power in such circumstances (as the batsman can no longer play any part in the innings).

“inappropriate and deliberate physical contact...”. Physical contact which is merely inappropriate (for example an accidental hand on a sensitive part) is not caught by the offence. Physical contact which is deliberate (for example patting a player on the back) but not inappropriate is also not prohibited.

29. There is no Level 1 offence for either “avoidable” physical contact or “inappropriate” physical contact. The Level 2 offence suggests that the conduct must be serious, which is consistent with giving “deliberate” its usual meaning as opposed to “not purely accidental” (the ICC submission).
30. Applying the principles of interpretation outlined above, the inclusion of the word “deliberate” as well as “inappropriate” means that the physical contact must be inappropriate and intentional. The concept of “purely accidental” is not an element of the offence.
31. It is not correct, therefore, to say that avoidable contact amounts to deliberate contact. For example, the Code itself uses “deliberate or avoidable” when talking about damage to the pitch.¹⁶
32. In the context of the Code and the interpretation principles above, I find that deliberately means what it says – that is consciously, or intentionally, or on purpose.
33. For completeness, I consider that in light of the principles underlying the Code (outlined above) it could also include a situation where the player knows that he is going to contact the other player and has the opportunity to avoid the contact but does not. This has some analogy with the concept of intention in the English criminal law where the defendant knows something is virtually certain to occur and continues anyway.¹⁷ I include that possible interpretation in my consideration.¹⁸

Evidence

34. As well as relevant video footage and documentation, the ICC called three witnesses, being the three umpires involved in the match, Chris Gaffaney, Sundaram Ravi and Kumar

¹⁶ Article 2.2.10. I note the ICC submitted these provisions were extracted from another document and are not persuasive as to the distinction between avoidable and deliberate.

¹⁷ *R v Woollin* [1998] 4 All E.R. 103 (House of Lords) affirming *R v Nedrick* (1986) 8 Cr. App. R. (S.) 179.

¹⁸ I note also for completeness the previous cases of inappropriate and deliberate contact cited to me by the ICC as precedent for the submission that where the player could have avoided the contact but did not, that was sufficient to constitute deliberate conduct. In particular, I was referred to S Sreesanth, 30 July 2007 (CC 5146), Shahid Afridi, 11 Nov 2007 (CC 5153), G Gambhir, 11 Nov 2007 (CC 5155), MS Dhoni, 18 Jun 2015 (CC 5542), N Dickwella, 7 Feb 2017 (CC 5621), the Appellant’s own previous incident, 7 Feb 2017 (CC 5622) (a charge the Appellant accepted without the need for a hearing), R Ngarava, 26 Feb 2017 (CC 5628) and Rilee Roussouw, CC 5543, 12 July 2015. I am not persuaded that these decisions assist in interpreting the words of the Code other than according to the ordinary meaning of the words used.

Dharmasena. Each confirmed the contents of a witness statement which was provided to me in advance.

35. Before the commencement of the evidence I asked the ICC if it intended to call Mr Smith, the Australian player the subject of the contact made. The ICC advised that it did not. The Match Referee did not have evidence from him. I had a transcript of what he was recorded as saying to the Umpire (discussed further below) and footage of his reaction. There was no further consideration during the hearing as to whether he was required as a witness by me or any party.
36. Mr Dharmasena's evidence was (in summary):

At the time of the relevant incident, I was standing at the bowler's end of the pitch.

Following Rabada's delivery to Smith, I gave a decision of LBW against Smith.

After indicating my decision, I looked to Smith and saw him moving towards the non-striker in order to decide whether he should appeal the decision or not.

At the same time, Rabada was celebrating the wicket.

Smith called for a review of my decision.

Smith then told me that Rabada had made contact with his shoulder.

I didn't see the contact first hand.

In response to Smith, I told him the incident would be considered by the umpires at the end of the day's play.

I then asked Rabada if he had made contact with Smith, to which Rabada said 'no'.

I then asked Chris Gaffaney, the other on-field umpire, whether he had seen any contact between Rabada and Smith, to which Gaffaney replied that he wasn't sure whether there had been any contact.

Following the conclusion of the day's play, the umpires got together and reviewed the footage of the incident.

Upon seeing this footage it was clear to me that there had been contact between Rabada and Smith and that the contact had been of Rabada's doing. Rabada had had plenty of time to have moved out of Smith's way and therefore avoided the contact but he didn't.

I believed that the footage showed that Rabada had made contact with Smith, and therefore had committed the offence of 'inappropriate and deliberate physical contact'. I therefore, together with Mr Gaffaney and S. Ravi (the TV umpire), lodged a form Rep 1 against Rabada alleging that he had committed the offence of 'inappropriate and deliberate physical contact'.

37. In cross-examination, Mr Dharmasena stated he "can't say that the contact was deliberate, but he had the opportunity to avoid it...". He was clear in his evidence, however, that in his opinion the video footage showed the contact was deliberate.

38. Mr Gaffaney gave similar evidence to Mr Dharmasena. He stated:

When Rabada and Smith came very close to each other, I saw Smith react as if he had been touched by Rabada as he walked past him. I knew something had happened, but I didn't actually see the contact.

I then walked over to Kumar while the review was taking place. I asked Smith what had happened, and Smith told me that Rabada had run into him.

I radioed Ravi, the TV umpire, and told him to take a note on his report that there have been an issue re contact by Rabada.

Faf du Plessis asked me what happened and I told him that there may have been contact between Rabada and Smith. Rabada overheard this and said "no I didn't touch him".

39. Mr Gaffaney also made the concession which was made by Mr Dharmasena and maintained that the video footage was the basis for the conclusion that the contact was deliberate.
40. In summary, therefore, Mr Dharmasena and Mr Gaffaney did not see the contact, conceded that they could not say it was deliberate, maintained that the opportunity to avoid the contact was a key feature and relied on the video footage to determine that the contact was deliberate.
41. Mr Ravi, the television umpire, gave evidence and stated:

My view was that Rabada had walked into Smith's space while looking at him, shouted 'Yes' three times in Smith's direction, and made no attempt to move to avoid contact with Smith.

I consider that Rabada had ample time to change his course and avoid contact with Smith, but he didn't. I also did not see any apology of any kind from Rabada to Smith.

In my view, therefore, there was inappropriate and deliberate contact on Rabada's part.

This view was only strengthened when I reviewed the footage again after the end of the day's play with the other umpires.

42. I agree with the essence of the Umpires' evidence that Mr Rabada could have avoided the contact. Mr Smith was walking towards the batsman at the other end (to check whether to review the decision within the 15 seconds available to do so) and was not at fault in any way in continuing his line. It was Mr Rabada who moved towards Mr Smith. The footage shows he moves off the pitch towards Smith.¹⁹
43. That in itself, however, is not sufficient to demonstrate that the contact was deliberate. I will discuss this further below, but in my view the Umpires were influenced in their conclusion that the contact was deliberate by the premise that if the contact was avoidable, then that was sufficient. That is consistent with the ICC submission. Neither the Umpires nor the Match Referee seemed to give weight to Mr Rabada's account that he did not realise he had made contact at the time and he did not intend to make contact.
44. The Umpires agreed that the contact was slight. Mr Ravi agreed in cross-examination that it appeared to him to be the slightest of contact. Mr Smith may have been able to comment on that but was not called to give evidence. The transcript of what Mr Smith said to Umpire Dharmasena was that "*Kagiso shouldered me... Kagiso was going, Yes, Yes, Yes and he shouldered me.*" In video footage, Mr Smith immediately reacted signalling to the umpire contact with the shoulder. Mr Rabada through counsel suggested Mr Smith was exaggerating the degree of contact. I take all of that into account.²⁰

45. Mr Rabada gave evidence. He stated:

¹⁹ For example Rabada Exhibit 13 - Clip 3, The Cricket Network – Stills at 0:00:08 and 0:00:15 (**Annex 1**).
²⁰ Note Article 6.2 allows facts to be established by any reliable means and allows the Judicial Commissioner not to be constrained by rules as to the admissibility of evidence.

He is a 22 year old cricket player who plays for the South African cricket team. He has played in 28 test matches. He is currently ranked as the number one bowler in the world in Test cricket.

During the match in question, he took 11 wickets and was awarded the man of the match award. The first of those 11 wickets was that of Steve Smith and which is the subject of the present dispute.

After delivering the ball that dismissed Steve Smith, he continued in the course of his follow through down the side of the pitch and celebrated that he had got Smith out.

The celebration was passionate given the importance of the wicket and the fact that he had been struggling with his bowling earlier that morning.

He passed Smith and turned towards the slip cordon to celebrate, in particular moving towards Theunis de Bruyn, who was standing at gully and who was therefore one of the closest fielders in his line of sight.

He and Smith were in close proximity when they passed each other but at the time he was not aware of, and did not feel, any physical contact between them.

After viewing the video footage, he now acknowledges that there seems to have been the slightest physical contact between them.

At no point did he deliberately make physical contact with Smith. In any event, any physical contact was, in the circumstances, not inappropriate.

46. Mr Rabada was cross-examined and it was put to him that he could have avoided the contact and that he did intend to make contact with Mr Smith. Mr Rabada denied that he intended contact. He maintained that he was focussed on his teammate de Bruyn coming from the gully region and was doing his traditional “Yes” celebration whilst pumping his shoulders and arms. He accepted he did make eye contact with Mr Smith but said that he tried to avoid contacting him and he did not know that he had at the time. Ms Clark put to Mr Rabada that he saw where Smith was, got into his space, could have avoided him and deliberately contacted him. Again, Mr Rabada denied the final point and said that he thought he had done enough to avoid contacting Mr Smith.
47. Mr Rabada appeared to me to be a frank, unassuming and honest witness. He conceded that contact had been made but maintained he did not know that at the time. That explained his response to the umpire that he hadn’t made contact.²¹ He was clear and consistent that contact was not intended. Given the burden and standard, I would have to disbelieve that evidence for me to be comfortably satisfied contact was deliberate.
48. The Match Referee relied on footage which in his view showed Mr Rabada dipping his left shoulder as if to prepare for contact. I reviewed the same footage and did not form the same impression.²²
49. I do not see this as a scenario where Umpire or Match Referee experience necessarily assists to determine from footage whether a player is readying for contact or not. One can assume,

²¹ The reasoning of the Match Referee that Mr Rabada was untruthful about contact and therefore the contact was deliberate does not logically follow and I have not adopted that.

²² A total of 8 video clips from ICC and Mr Rabada, showing various angles and perspectives of the incident.

given the non-contact nature of cricket, that the Umpires and Match Referees do not have special expertise in intentional or accidental contact. In any event, it is my role to examine the matter afresh and interpret the footage in light of the evidence and submissions.

50. When viewed in slow motion²³, it appears to me that at and after the point of contact, Mr Rabada's arm moves backwards behind him. In my view, that raises the possibility that rather than Mr Rabada being prepared (or braced) for contact, instead the contact occurs and seems to push his arm backwards. In any event, it is not clear to me that there was a dipping of the shoulder which can be attributed to "readying for contact". The dipping and raising of the shoulders by Mr Rabada appears to be part of the celebration ritual rather than preparing for contact.²⁴
51. In all, review of all the footage demonstrated that Mr Rabada moved close to Mr Smith and each made eye contact before there was contact between their respective shoulders. By the time of the contact, however, Mr Rabada was looking past Mr Smith and not at him. Mr Smith likewise was looking past Mr Rabada.
52. From a review of the footage, it is equally possible that the contact was an accident as it was deliberate. That is particularly so given the contact appeared to be slight and brushing rather than direct and particularly forceful. It would take a careful aim in the circumstances to brush past the player concerned without more dramatic contact occurring.
53. Counsel for Mr Rabada also submitted a statement from Mr Faf du Plessis and Mr Moosajee, which was to the effect that this appeal also has far greater ramifications as it goes to the question of whether the ICC Code is being applied inconsistently and inappropriately across different countries and individuals. The submission was that Mr Rabada was unfairly targeted by the Australian team (for reasons of his disciplinary history) and by the disciplinary system.
54. I admitted this evidence but made it clear to the parties that I did not regard it as relevant to the issue in the hearing. The ICC did not seek to cross-examine Mr du Plessis or Mr Moosajee after I gave that indication.

Conclusions on Evidence

55. I am not "comfortably satisfied" that Mr Rabada intended to make contact with Mr Smith or knew it was going to occur (in terms above). I accept Mr Rabada's evidence which he gave in a forthright and open manner that he never intended contact to be made nor did he know it was going to occur. I do not find that the footage of the incident assists greatly on whether the contact was intentional or deliberate.
56. I understand why the Umpires took the decision to charge Mr Rabada, in particular because of their focus on whether Mr Rabada could have avoided the contact. The Code, however, requires more than just "the contact could have been avoided by the player". The Code

²³ Refer Rabada Exhibit 13 - Clip 3, The Cricket Network – Stills at 0:00:14 and 0:00:15 (**Annex 1**).

²⁴ Mr Rabada gave evidence that this was what he was doing.

uses the word “deliberate” as well as “inappropriate”. In doing so it distinguishes contact which is accidental or careless from contact which is intentional.

57. The Umpires were not able to add to the evidence which appeared on the video footage (two of them did not see the contact occur). Mr Smith was not called to give evidence but his statements at the time provide some support for the ICC contention.
58. Mr Rabada’s evidence was considered against that other evidence. I was not persuaded by the footage that Mr Rabada should be disbelieved. I accept that in celebrating and moving close to Mr Smith, Mr Rabada did not in fact intend to contact Mr Smith but was intending to walk close to but past him (whilst celebrating).
59. It was plausible and I accepted his evidence that he did not mean to contact Mr Smith and was moving towards his team-mate Mr de Bruyn to celebrate. The video footage was not conclusive that Mr Rabada intended, or meant, to make contact. It was equally plausible from the footage that this was careless rather than intentional conduct.
60. I therefore find Mr Rabada not guilty of the charge under 2.2.7.

Alternate, lower level offence

61. I am entitled, however, to consider whether the conduct involved constitutes a lower level offence.²⁵ There is no Level 1 offence for inappropriate or avoidable physical contact.²⁶
62. I consider that the conduct was inappropriate, lacked respect for his fellow player and involved non-deliberate and minor contact with another player. The actions contravened the principle that a dismissed batsman should be left alone (as discussed above).

²⁵ Article 7.10.5 where the *Match Referee* or *Judicial Commissioner* finds a *Player* or *Player Support Personnel* not guilty of the offence allegedly committed under the *Code of Conduct*, then it remains open to him/her, at his/her discretion, to find the *Player* or *Player Support Personnel* guilty of an offence of a lower level than that with which he/she has been charged.

²⁶ The relevant possible offences are under Article 2.1.1 and 2.1.7

2.1.1 Conduct that is contrary to the spirit of the game.

NOTE: Article 2.1.1 is intended to cover all types of conduct of a minor nature that is contrary to the spirit of the game and which is not specifically and adequately covered by the specific offences set out elsewhere in this Code of Conduct. The spirit of the game is defined by reference to the Preamble to the ICC Standard Test Match, ODI and T20I Playing Conditions and involves respect for (a) your opponents, (b) your captain and team, (c) the role of the umpires and (d) the game and its traditional values. By way of example, Article 2.1.1 may (depending upon the seriousness and context of the breach) prohibit, without limitation, the following: (a) the use of an illegal bat or illegal wicket-keeping gloves; (b) cheating during an International Match, including deliberate attempts to mislead the Umpire; and (c) failure to comply with the provisions of clause 6.3 of the ICC Standard Test Match, ODI and T20I Playing Conditions.

2.1.7 Using language, actions or gestures which disparage or which could provoke an aggressive reaction from a batsman upon his/her dismissal during an International Match.

NOTE: Article 2.1.7 includes any language, action or gesture used by a Player and directed towards a batsman upon his/her dismissal which has the potential to provoke an aggressive reaction from the dismissed batsman, whether or not any reaction results, or which could be considered to disparage or demean the dismissed batsman, regardless of whether the batsman himself feels disparaged or demeaned.

Without limitation, Article 2.1.7 includes: (a) excessive celebration directed at and in close proximity to the dismissed batsman; and (b) verbally abusing the dismissed batsman.

Nothing in this Article 2.1.7 is, however, intended to stop Players celebrating, in an appropriate fashion, the dismissal of the opposing team’s batsman.

63. There is no directly applicable Level 1 offence but the conduct was similar to the kind of conduct involved in a breach of Article 2.1.7 and in my view was also contrary to Article 2.1.1.²⁷
64. Counsel for Mr Rabada submitted that it would be unfair to find him guilty of such a lesser offence given it has arisen in the course of the hearing but accepted that such a course is open to me.
65. The ICC accepted that I could find Mr Rabada guilty of an offence under Article 2.1.1 (rather than 2.1.7) but it primarily urged me to uphold the finding under 2.2.7.
66. I accept the ICC submission that Mr Rabada's conduct was contrary to the spirit of the game, given the two key principles discussed above and the underlying concept of the spirit of cricket. It was provocative, disrespectful and involved getting close enough that the risk of physical contact was high. Accepting he did not intend the contact, it remains contrary to the spirit of cricket to get too close to the dismissed batsman in these circumstances.
67. Accordingly, I find Mr Rabada guilty of the Level 1 offence of engaging in conduct that is contrary to the spirit of the game.

Penalty for alternate offence

68. The ICC submitted that the conduct was worthy of a sanction within the upper part of the range (between 26 and 50% of the match fee, which in turn would involve 2 demerit points). Mr Mpofu submitted that the penalty should be a minor one and that I must have regard to the consequences of the penalty imposed including demerit points. He submitted that the consequences were an integral part of the sentencing regime and I could not close my eyes to them. He submitted that there should be no finding of an alternate offence and (at worst) this offence was at the lowest level and warranted a low level fine (if any).
69. The issue arose as to whether in imposing the penalty on Mr Rabada I can have regard to the consequences of the penalty in terms of demerit points. In this case, a penalty of more than 25% of the match fee would have resulted in two demerit points which in turn would have meant Mr Rabada would have reached 8 demerit points and therefore been automatically suspended for two test matches (the next two against Australia).
70. The ICC submitted that I must ignore the consequences for Mr Rabada (as to demerit points). The ICC submitted that the first offence (eligible for demerit points) must be treated in the same way as the last offence (the one which puts the player above the demerit point threshold).

²⁷ At the hearing the ICC submitted an alternate offence under Article 2.1.1 "Conduct that is contrary to the spirit of the game" could be considered if the offence under Article 2.2.7 was not made out. In written submissions the ICC noted: "*when the contact is viewed in the context of the Appellant's overall demeanour, it appears that he is showing aggression towards Smith, shouting "yes, yes, yes" closely in his proximity. This in and of itself could be considered to be evidence of an offence under Article 2.1.7 of the Code, although the Appellant was not charged with that offence and therefore it is not under consideration.*"

71. The relevant penalty Articles are:

7.1 Where a *Match Referee* or *Judicial Commissioner* determines that an offence under the *Code of Conduct* has been committed, he/she will be required to impose **an appropriate sanction** on the *Player* or *Player Support Personnel*.

7.2 In determining the appropriate sanction, the *Match Referee* or *Judicial Commissioner* shall take into account **any factors that he/she deems relevant and appropriate to the mitigation or aggravation of the nature of the Code of Conduct offence** before determining, in accordance with the table set out in Article 7.3 below, what the appropriate sanction(s) should be.

7.5 Each time a *Player* or *Player Support Personnel* is found to have committed an offence under the *Code of Conduct* and a sanction is imposed by a *Match Referee* or *Judicial Commissioner*, corresponding *Demerit Points* as per the table in Article 7.3 above **shall be added** to the *Player* or *Player Support Personnel's* record and accumulated with any existing *Demerit Points* imposed on the *Player* or *Player Support Personnel* within the previous twenty-four (24) months. The ICC's Cricket Operations Department will keep an accurate and up-to-date record of all *Demerit Points* imposed upon *Players* and *Player Support Personnel* and will carry out the process of accumulating *Demerit Points* **each time a Player or Player Support Personnel is found to have committed an offence and sanctioned.** (my emphasis added)

72. On its face, I am inclined to accept the ICC submission that (in the usual circumstances) the Match Referee or Judicial Commissioner should reach the appropriate sanction by having regard to the relevant and appropriate factors which relate to the nature of the offence (as per Article 7.2) and no more. The difficulty with that is that it might ignore factors relevant to the particular player (the offender). The nature of the offence and the nature of the offender are key components of a penalty decision. For example, if the player has a history of offending (as Mr Rabada does).

73. It is difficult to accept that absent a very clear instruction from the Code, the Match Referee or Judicial Commissioner cannot have regard to the nature of the offender and the consequences of a specific penalty for that offender. The Code, with respect, is not express on that point.

74. Given the point was not fully argued, I express a tentative conclusion that at least the demerit point consequences for a player are not intended to be a relevant consideration in imposing a penalty. They are intended to follow automatically from the penalty and to operate alongside it. However, I leave the matter for a case where it is fully argued and plainly an issue.

75. Taking into account all factors which I deemed relevant and appropriate to the mitigation or aggravation of the nature of the offence, I find the conduct to be at the relatively minor end of the scale, in particular given the words used, the celebration involved and the fact that any physical contact was minor, careless and not deliberate. I agree with the ICC, however, that this sort of conduct needs to be deterred and that it is relevant that Mr Rabada knew of the prohibition against contact given his previous incident.

76. The offence under Article 2.1.1 has two penalty ranges (as does 2.1.7). After considering all relevant factors and reviewing relevant ICC cases²⁸, I consider a penalty of the imposition of a fine of 25% of the applicable match fee to be an appropriate penalty for the breach of Article 2.1.1.
77. As a consequence, 1 demerit point accrues. Mr Rabada will be well aware of the consequences of any further breaches of the Code.
78. I specifically note the assistance I was given by the ICC, all counsel, the Umpires and Mr Rabada. I am very grateful for their assistance in allowing the matter to be dealt with fairly and expeditiously. In particular I note the high quality of the written material and submissions provided by Ms Clark for the ICC and the very effective and efficient conduct of the case by Mr Mpofu SC, Ms Clark and other counsel (including Mr Kemp for his assistance with the technology and documents during the hearing).



Michael Heron QC

ICC Judicial Commissioner

28 March 2018

²⁸ For examples see <https://www.icc-cricket.com/about/cricket/rules-and-regulations/code-of-conduct> including Virat Kohli 15-01-2018 under Article 2.1.1, Danushka Gunathilaka 27-01-18 under Article 2.1.7, Mashrafe Bin Mortaza 27-01-2018 under Article 2.1.7, Nathan Lyon 04-03-2018 under Article 2.1.1.

Annex 1 – Still Clips





