

RUGBY WORLD CUP 2019

IN THE MATTER OF AN APPEAL BROUGHT BY FACUNDO GATTAS (URUGUAY) AGAINST THE DECISION OF THE JUDICIAL COMMITTEE

Match: Georgia v Uruguay, 29 September 2019, Kumagaya Stadium

Hearing venue: Offices of Atsumi & Sakai, Uchisaiwaicho, Chiyoda-Ku, Tokyo

Appeal Panel: Christopher Quinlan QC (Chair, Independent Judicial Panel Chairman),
Pamela Woodman (Scotland)
Donal Courtney, Former International referee (Ireland)

Representation: Aaron Lloyd, Counsel for Gattas
Santiago Slinger, Team Manager, Uruguay
Ben Rutherford, DDO
Alistair Maclean, General Counsel, World Rugby

Date of the hearing: 4 October 2019

A. Introduction

1. On 4 October 2019 the Appeal Panel heard and dismissed an appeal by Facundo Gattas ('the Appellant') against the decision of the Disciplinary Committee (Jean-Noël Couraud (Chair, France), Frank Hadden (former Scotland coach) and Jose Luis Rolandi (former referee and Argentina Team Manager) to uphold a red card and to impose a 3-match suspension.
2. The red card was issued to him for a breach of Law 9.13, namely committing a dangerous tackle, committed in the Rugby World Cup match played between Georgia and Uruguay on 29 September 2019 at Kumagaya Stadium. The Disciplinary Committee's ('DC') decision was announced following a hearing on 1 October 2019 and promulgated by a written decision dated 2 October 2019 ('the Decision'). The DC took a mid-range starting point of 6 weeks because there was contact with the tackled player's head. It then applied full mitigation of 50 per cent to leave a 3-week sanction. This was converted into a 3-game sanction because this is a tournament. The DC directed that the suspension covered Uruguay's last 2 pool stage matches. The DC also directed that if Uruguay reached the quarter finals, that match should count as part of the suspension but if not, the suspension should be carried over to the Appellant's next club match on 19 October 2019.
3. The appeal was brought by way of a Notice of Appeal ('the Notice') dated 3 October 2019. The appeal was limited to the DC's "*decision to uphold the Red Card*".
4. This document constitutes the Appeal Panel's final reasoned Decision. It represents our unanimous conclusions. It is necessarily a summary. It is reached after appropriate consideration of all the evidence, submissions and the other material placed before us. Nothing is to be read into the absence of specific reference to any aspect of the

material or submissions before us. We considered and gave appropriate weight to it all.

B. Facts

5. The Referee's red card Report read:

"In the 77th minute of the game, the TMO, Marius Jonker, asked me to review a potential act of foul play. From looking at the screen I saw the shoulder of Uruguay 16 make contact with the head of a Georgian player. The contact was significant and there was no reason in my view to mitigate the action and so I issued a red card"

6. The TMO's Report states:

"In the 77th minute of the game N°16 Uruguay made contact with the head of an opponent with his shoulder. The contact was direct and significant and I brought this to the attention of Referee Wayne Barnes. No mitigating action/factors could be identified and the red card was issued".

7. The relevant video footage shows (in summary) the following:

- a. The incident took place at 76:02 of the match, around 6 metres from the Uruguayan try line and around 17 metres from their right touchline.
 - b. The Appellant is standing in a defensive line at a ruck around 4 metres from his home try line. The ball is passed from the ruck to Georgia 6 ('G6', Shalva Sutiashvili,) who heads for the space between the Appellant and Uruguay 5 ('U5'). He is carrying the ball in his right arm, bent at approximately 90 degrees at the waist.
 - c. U5 tackles G6 from his (G6's) right hand side, making first contact with G6's right shoulder. This impact slows G6, causes him to move laterally to his left and also causes his head to rise slightly.
 - d. The Appellant moves forward, sets his feet in a strong wide stance and is bent at the knees.
 - e. When G6 reaches him, the Appellant holds his right arm out and moves his left shoulder forwards and upwards, making a contact with the left side of the face of G6.
 - f. G6 falls to the ground holding his face and remains there for around 20 seconds before slowly getting to his feet.
8. At the time 76:57 of the match the TMO asks the referee to review the action for a potential act of foul play. We viewed video footage with audio of the exchanges between the referee and the TMO before the referee issued the red card.

9. In a brief initial statement, G6 stated as follows:

"I am not thinking that something was dangerous for my health, I fill contact on head"

10. In a later statement he said:

"With this email, I would like to inform you that during the game against Uruguay on 29th September on 77th minute I have been received the ball and was moving forward"

when I was tackled, but do not exactly remember area of tackle. After contact I had head pain.”

11. The Georgia team doctor stated:

“After the impact event, Shalva Sutiashvili was immediately removed from the field of play because of a suspected concussion. HIA 1 results were unclear, follow-up HIA 2 and HIA 3 was normal. Yesterday’s and today’s neurological assessment reveals no signs and symptoms. No concussion diagnosis.”

12. The Appellant’s case as articulated in his reply to the DC’s standard directions was that the collision was *“involuntary, casual, accidental”*. He sought to establish that the referee’s decision to order him off was *“wrong”* pursuant to World Rugby Regulation 17.17.3. The detail of his case is addressed in our consideration of his grounds of appeal. Before us he accepted committing recklessly an act of foul play contrary to Law 9.13 but argued it was not one which merited a red card.

C. Decision appealed against

13. The Decision records the following findings of facts:

- a. The DC was not satisfied that the contact with the ball carrier’s head was an accidental collision.
- b. The video clips *“clearly show”* the Appellant holding out his right arm and driving his left shoulder forwards and upwards, making contact with the left side of the face of G6.
- c. Further, the DC did not accept the argument that this *“was a passive tackle”*. It found the player’s action was *“more akin to a dominant tackle with a high degree of danger”*.
- d. It also concluded that there was no evidence of a *significant* (its word) change of direction in the ball carrier’s running line until after contact.

14. The DC applied World Rugby’s “Decision-Making Framework for High Tackles”, which also applies to shoulder charges (‘HTSF’). In the Decision the DC expressed itself “satisfied” that:

*“• The Player had initiated a contact with his left shoulder. It was a direct contact to the head of the ball carrier;
• It was not a passive tackle. The offending was more akin to a dominant tackle;
• The impact of the head contact was with force;
• There was consecutively a high degree of danger;
• The factors to consider against mitigation were present. The Player and the ball carrier were in an open space and the Player had a clear line of sight.
• There are no clear and obvious mitigating factors.”*

15. Accordingly, it was not satisfied, on the balance of probabilities, that the referee’s decision to send off the Appellant was wrong and so upheld the red card.

D. Grounds of Appeal

16. The Notice sets out the following grounds of appeal against the upholding of the red card, namely that the DC erred in finding:

- “(a) the tackle was a dominant tackle; and/or*
- (b) that there was a high degree of danger in the tackle; and/or*
- (c) that the “open space” factor against mitigation was relevant in the circumstances of this tackle; and/or*
- (d) that it is correct to say that “the Player has initiated a contact with his left shoulder” without considering the overall context of the engagement which in fact showed the Player holding his ground and bracing for the expected contact of the ball carrier charging into him (hence why the tackle was not “dominant”); and/or*
- (e) that there were not material factors to consider in mitigation (and in particular, that the actions of 5 Uruguay were not a mitigating factor); and*
- (f) that overall, the circumstances of the tackle were such that it meets the Red Card threshold.”*

17. Mr Lloyd supplemented the Notice with helpful written submissions filed in accordance with our pre-hearing Directions. Therein he accepted the Appellant committed an act of foul play contrary to Law 9.13. Mr Lloyd’s primary submission was that the DC’s decision to uphold the red card was wrong. He expanded upon each of the issues raised by the grounds of appeal both in his written submissions and in his constructive oral argument before us.

E. Rugby World Cup Limited’s Response

18. In his equally helpful written submissions, also filed in response to our pre-hearing Directions, the DDO:
- a. Reminded us of the correct test to be applied by an appeal panel considering an appeal by way of a review;
 - b. Provided us with some informative background to the creation of HTSF, its purpose and recent judicial consideration of it; and
 - c. Addressed seriatim each of the Appellant’s arguments.

F. Decision

(1) Approach of the Appeal Panel

19. The Disciplinary Programme in Section 14 of the RWC 2019 Terms of Participation (‘ToP’) provides that (subject to minor tournament specific amendments) the applicable regulations are World Rugby Regulations 17 and 18 (‘R17’ and ‘R18’ respectively) and Appendix 1 to R18 (‘Appendix 1’).

20. Clause 4.4 of Appendix 1 provides:

“Except where an appeal proceeds in whole or in part, and then only with respect to that part, as a de novo hearing and subject to clause 3.3 above, appeals and any question of fact arising on appeal will be heard and determined based on the record of the decision and the evidence received and considered by the Judicial Committee or Judicial Officer.”

21. The Appellant expressly did not apply for a *de novo* hearing. Paragraph 5 of the Notice states: *“The nature of the appeal sought is a review only...”*.

22. Clause 4.5 of Appendix 1 states:

“Except where an appeal proceeds in whole as a de novo hearing it is for the Appellant to establish that the decision being challenged on appeal:

(a) was in error (either as to central factual findings or in law);

(b) in the interests of justice should be overturned;

(c) the sanction imposed was manifestly excessive or wrong in principle; and/or

(d) the sanction imposed was unduly lenient.”

23. There is no appeal in respect of the 3-match suspension.

24. Clause 4.6 of Appendix 1 provides:

“Except where an appeal proceeds in whole or in part, and then only with respect to that part, as a de novo hearing, appeals shall be conducted on the basis that:

“(a) the evidential assessment or decision involving an exercise of discretion or judgment of or by a Judicial Committee or Judicial Officer shall not be overturned save in circumstances where the relevant findings made by the Judicial Committee or Judicial Officer are manifestly wrong;

(b) the evidential assessment or decision involving an exercise of discretion or judgment of or by a Judicial Committee or Judicial Officer shall not be overturned save in circumstances where the Judicial Committee or Judicial Officer applied wrong principles in the exercise of its/his discretion which has resulted in an erroneous decision being made; and/or

(c) [...]”

25. Accordingly, the DC’s Decision should not be interfered with unless its findings were manifestly wrong, or it applied the wrong principles in the exercise of its discretion which resulted in an erroneous decision being made. This being a conventional appeal (i.e. a review) the onus was upon the Appellant to establish the error/s.

26. We agree with the observations of a different Appeal Panel in its decision earlier this week in the appeal of *Matu’u* (RWC 2019 2 October 2019):

“[...] appellate panels have to be very cautious in overturning findings of fact, including evaluative findings of fact to the effect that a red card test has been met, made by committees sitting at first instance. This is because such committees have seen the players and taken into account the whole of the sea of the evidence as opposed to indulging in impermissible hopping on to islands or parts only of the evidence in an appeal. For those reasons appellate panels will only interfere with findings of fact if committee was plainly wrong. This means making a finding of fact which had no basis in the evidence, or showing a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence so that the decision cannot reasonably be explained or justified [...]”

(2) The HTSF

27. The HTSF is the embodiment of World Rugby’s commitment to player welfare as its number one priority. The HTSF is underpinned by research from approximately 1,500 matches which demonstrated that: (i) 76% of head injuries occur in the tackle; (ii) 72%

of concussions in the tackle occur to the tackler; (iii) that the risk of injury is 4.2 times more likely with a high tackle; (iv) illegal head contact tackles are 36 times more likely to cause injury than legal tackles; (v) higher contact tackles (above sternum) are four times more likely to injure players; and (vi) upright tacklers are 44% more likely to suffer a head injury.

28. The HTSF applies only to acts of foul play. Not every contact with an opponent's head in a game of Rugby Union is foul play. Contact with an opponent's head may (obviously) occur accidentally. Accidental head contact is not foul play.
29. The HTSF does not change the law. It was approved by World Rugby Council (on which all Unions are directly or indirectly represented) in May 2019 as a Law Application Guideline. That means its application is mandatory for match officials, citing commissioners and the judiciary when sanctioning shoulder charges and high tackles where there is contact with the ball carrier's head¹.
30. The primary purpose of the HTSF is to improve consistency in the application of sanctions by distinguishing between dangerous tackles that warrant a penalty, yellow card or red card. It guides decision making by providing a framework which comprises a series of logical and clear steps to be followed when assessing the gravity or seriousness of an act of foul play in one of two situations: high tackles and shoulder charges. By its very nature it is a guideline and not exhaustive. It is also a valuable educational tool for players, coaches, media and spectators.
31. Application of the HTSF necessarily involves the exercise of judgement by the decision maker. The HTSF provides the mandatory structure within which that judgement is to be engaged, by driving logical consideration of the relevant issues. By that methodical consideration of those issues, consistent outcomes are reached.
32. The HTSF was recently subjected to careful and lucid analysis by the disciplinary committee considering a citing in this tournament (*Francis*, RWC 2019, 1 October 2019). This appeal, like the case of *Francis* requires consideration of the factors for and against mitigation. That is likely to prove the most challenging area when applying the HTSF. It necessitates a balancing exercise, involving judgement. Like the disciplinary committee in *Francis* we commend the approach articulated by the DDO in that case:

"The starting point for a CC (and it is the same process for a match official or a JO) is to pose the question:

(i) Are there clear and obvious mitigating factors?

(ii) In order to start to decide that, the CC must first take account of the 'Factors to consider against mitigation' which the CC has found to exist in the particular case.

(iii) The CC must then consider "Mitigating factors" (which must be clear and obvious), which the CC has found to exist.

(iv) 'Factors to consider against mitigation' do not necessarily exclude 'Mitigating factors' being applied by the CC, but careful consideration ought to be given as to whether they outweigh the 'Mitigating factors'.

(v) As an example, where tackler and ball carrier are in open space, and tackler has a clear line of sight of the ball carrier, and sufficient time to respond to a sudden drop in

¹ The penultimate sentence in paragraph 44 of *Francis* must be read in that context

the ball carrier's height, then the 'Factors to consider against mitigation' are likely to outweigh the 'Mitigating factors'.

(vi) The nature of any 'sudden' drop in the ball carrier's height must be considered by the CC; with 'sudden' bearing its ordinary meaning of quickly and unexpectedly. The CC must consider whether the ball carrier's actions happened quickly and in a manner that was not reasonably to be expected."²

(3) Decision to uphold the red card

33. First, the relevant Law is 9.13 which provides:

"A player must not tackle an opponent early, late or dangerously. Dangerous tackling includes but is not limited to tackling or attempting to tackle an opponent above the line of the shoulders even if the tackle starts below the line of the shoulders".

34. On these facts, his admission must be that his tackle was dangerous, for it was neither early nor late. In light of the Appellant's acceptance that he committed an act of foul play contrary to Law 9.13, which involved contact with an opponent's head, the HTSF is engaged.

35. The central issue is whether the DC was manifestly wrong in concluding that the Appellant had failed to discharge the burden of showing that the referee was wrong to issue the red card. Manifestly wrong means making a finding of fact which has no basis in the evidence or shows a demonstrable misunderstanding of relevant evidence or a palpable failure to consider relevant evidence so that the decision cannot reasonably be explained or justified.

36. It is therefore appropriate to consider the DC's relevant factual findings and whether they are soundly based on the available evidence. In assessing those findings, we have had regard to all of the evidence. We take each in turn, though appreciate there is some overlap between them.

37. First: the DC was not satisfied that the contact with the ball carrier's head was an accidental collision. This is accepted by the Appellant.

38. Second: the video clips "*clearly show*" the Appellant holding out his right arm and with his left arm down by his side and not attempting to wrap and driving his left shoulder forwards and upwards, making contact with the left side of the face of G6.

- a. In our judgement that description (reasonably) accords with the available video footage.
- b. The clip labelled "FR14 – Corner UMS" provides a view or angle from behind the Appellant from about ground level. The footage timed at 04.08-04.09 shows the Appellant both feet on the ground, bent at each knee. He is crouched, leaning slightly forwards. He is braced for contact. He moves up and towards the ball carrier, and as he does so, turns his left shoulder towards him.
- c. The clip labelled 15 Reverse SSM shows the coming together of the players from a higher vantage point, from the touchline slightly behind G6's left shoulder. It shows the Appellant braced, and then moving upwards and forwards towards G6 before the two men are in contact.

² Paragraph 49

- d. The Appellant was questioned searchingly (and correctly) by the DC on this point We have had the benefit of reading the transcript of the full hearing. This line of questioning (conducted by one of the panel members) squarely tested the Appellant on this aspect³.
- e. The effect is that his left shoulder moved up and towards and makes contact with the left side of the ball carrier's face.

39. Next we consider the issue of description of the tackle, namely dominant or passive:

- a. Under the heading "*VIDEO SIGNS INDICATING HIGHER DEGREE OF DANGER*" the HTSF provides:

"Contact • *Tackler is attempting an active/dominant tackle, as opposed to passive/soak, or "pulling out" of contact*
 • *Tackler speed and/or acceleration into tackle is high Rigid arm or elbow makes contact with BC head as part of a swinging motion"*

- b. We accept that G6's left shoulder made contact with the Appellant's head. Mr Lloyd submitted that such was the "*effect*" of G6 moving into the engagement and promoting his left arm and shoulder forwards. We agree that G6 moved into the contact. That is hardly surprising, since he was carrying the ball 6 metres from the Uruguay goal line. But that does not detract from nor undermine the factual findings as to what the Appellant did as set out in the preceding paragraph (38). Further, the actions by G6 did not *cause* the Appellant's left shoulder to move forwards and upwards. They may have exacerbated the rotation but that was after the Appellant had started moving forwards and upwards.
- c. Based on the Appellant's actions as described in the preceding paragraph, the DC was perfectly entitled to conclude it was not a "*passive tackle*". The Appellant's actions were not passive in the sense he did not soak or absorb the ball carrier's weight and go backward with him. Instead he moved his body towards him whilst keeping his feet planted.
- d. That movement towards him is what the DC had in mind when it described his actions as being "*more akin to a dominant tackle with a high degree of danger*". The DC was not there saying that he *did* perform a dominant tackle, but rather that what he did was more like ("*akin*") to a dominant than a passive tackle. We would characterise it as active rather than dominant; active is also an indicator of a higher level of danger.
- e. We shall return to the issue of dangerousness in paragraph 42.

40. The DC also concluded that there was no evidence of a *significant* change of direction in the ball carrier's running line until after contact. Mr Lloyd criticised this finding, identifying for us movement of G6 which he accepted was not substantial but was, in the context of this event, significant. Having analysed the footage with care (and as is apparent from paragraph 7c above), we agree with Mr Lloyd that U5 caused G6 to move laterally. However, in the context of the events, the DC was not manifestly wrong to conclude that such movement was not a significant change of direction in the ball carrier's running line.

³ P23 (line 24) to p25 (line 15)

41. It was to those factual findings that the DC applied the HTSF. We next assess that exercise. The HTSF defines a shoulder charge thus: “*arm of the shoulder making contact with the ball carrier is behind the tackler’s body or tucked in ‘sling’ position at contact*”. At the point of contact by the Appellant’s left shoulder, his left arm was in front of his body. Therefore, the correct pathway in the HTSF is that provided for high tackles.

42. This was an illegal tackle (and is accepted by the Appellant to be so) causing clear contact to the ball carrier’s head. The contact was with the Appellant’s (the tackler’s) shoulder. It is therefore pathway 3.

a. The degree of danger:

- i. The referee assessed it as high.
- i. The DC assessed it as high
- ii. Looking at the “VIDEO SIGNS INDICATING HIGHER DEGREE OF DANGER” in the HTSF, the Appellant’s actions were more in keeping with those of a dominant than a passive tackle, thereby indicating (not establishing) a higher degree of danger. That is part of the exercise in assessing the level of danger. One also has to look at the other relevant facts.
- iii. The other relevant facts include the direct impact of his shoulder moving forwards and into G6’s head, with force. In consequence G6 was required to leave the field of play to undergo head injury assessment.
- iv. On those facts, the DC was (as was the referee) reasonably entitled on the evidence presented to come to that conclusion.

b. The starting point is therefore red card.

c. The next question is whether there are any factors to consider against mitigation.

- i. The DC found present the single factor listed in the HTSF, namely that the Appellant and the ball carrier were in open space and the Player had a clear line of sight.
- ii. Mr Lloyd did not seriously challenge that but submitted that the DC put incorrect emphasis on this and erred in not having proper regard to what he argued was a “*sudden change in circumstances*” before the collision. In doing so he relied on this passage in *Francis*:

“50. The Panel saw force in a submission made on behalf of the Player that a factor against mitigation should not be brought into the balance unless, in relation to the facts of the particular case, it was a factor of relevance – it had a “real bearing”. If it is not factually relevant, then it should not have application. The Panel sets out the submission on behalf of the Player as to this: ‘If the fact that a player has a ‘line of sight’ has no real bearing on what subsequently took place in terms of a mitigating factor, then the previous line of sight should not preclude the implementation of a mitigating factor”.

51. The point may be best illustrated in the present case. The fact that the Player had, as he accepted, a clear line of sight from where he was

at the kick-off to where the USA 15 was some 25m away has no relevance. The factor of the Player's line of sight before contact is of relevance as at the time of the sudden drop – what was the tackler's line of sight (to contact) then. The tackler's line of sight to contact becomes relevant when the change occurs, which the tackler is able to see.”

- iii. We agree with those comments.
- iv. However, we also agree with the DC's inferential finding that there was no sudden and material change of circumstances to mitigate its application. As we have already found⁴, the actions of U5 did not significantly alter the dynamics of the situation. Accordingly, the DC's conclusion on this point was not manifestly wrong.

43. The next issue is whether there are any clear and obvious mitigating factors.

- a. The DC found that none of the five listed in the HTSF were clear and obvious. With respect we are not persuaded that there is any substance in the difference between the DC stating – in a summary announcement of its decision – that there was “*no mitigation*” and in the full written decision that there were “*no clear and obvious mitigating factors*”.
- b. The Appellant did not:
 - a. Make a definite attempt to change height in an effort to avoid ball carrier's head; nor
 - b. Was he unsighted prior to contact; nor was this
 - c. A “Reactionary” tackle, with an immediate release; and
 - d. Contact was not indirect.
- c. Further G6 did not suddenly drop in height (e.g. from earlier tackle, trips/falls/dives to score).
- d. Therefore, the DC was correct to conclude that none of the 5 listed factors was present.
- e. Further, the DC found that there were no other clear and obvious mitigating factors and, on the evidence, it was entitled to do so.

44. Therefore, we can discern of no error in approach or reasoning by the DC or in the factual conclusions it reached. The DC's conclusion was that the Appellant had failed to establish on the balance of probabilities that the referee's decision to issue a red card was wrong. Accordingly, it was bound to uphold the red card. Similarly, in those circumstances we are bound to dismiss the appeal and do so.

(3) Sanction

45. There was no specific appeal against sanction. We did not interfere with the three-weeks suspension for reasons we now explain.

46. The Appellant challenged the issuing of the red card. He received a full discount of 3 weeks from the starting point of 6 weeks. In a citing where a player does not accept that the red card test has been met or where a player challenges the issuing of a red card, it might be thought wrong to allow a full discount because there has not been “(a)

⁴ See paragraphs 37-40

the presence and timing of an acknowledgement of culpability/wrongdoing by the offending player” to the full extent of the wrongdoing that has been found to apply in his case (per R17.19.4(a)). In an earlier case in this tournament (*Hodge*) a full discount of 50 per cent was applied even though a citing was fully contested.

47. We agree with the observations and approach of the appeal panel in *Matu’u* that “*for the sake of consistency in this particular tournament*” that approach was followed in that case, and indeed in others. In this particular case we agree that in the light of this player’s playing record and other features of mitigation, some reduction from the 6-week starting point was required. However, save for ensuring consistency with earlier decisions in this particular tournament, it is not readily apparent why the reduction should have been a full 50 per cent.

48. It is to ensure that same consistency and so as not to visit unfairness on this Appellant that we have adopted the same approach. We do not intend thereby to set any precedent outside the scope of the RWC 2019. Once more we agree with these observations in *Matu’u*:

“Therefore nothing that we say in this judgment is intended to endorse the approach of allowing a 50 per cent reduction for mitigation in circumstances where the player has not fully acknowledged his wrongdoing by accepting that the red card test has been satisfied.”

(4) Appeal bond

49. The appeal being unsuccessful, we order that the appeal bond should not be returned.

Christopher Quinlan QC, Chair
Pamela Woodman
Donal Courtney

5 October 2019