

DISCIPLINARY DECISION



Match	British & Irish Lions v South Africa		
Competition	British & Irish Lions Tour of South Africa 2021		
Date of match	31 July 2021	Match venue	Cape Town Stadium
Rules to apply	Regulation 17 World Rugby Handbook		

PARTICULARS OF OFFENCE

Player's surname	Sinckler	Date of birth	30 March 1993
Forename(s)	Kyle		
Player's Union	British & Irish Lions		
Referee Name	Ben O'Keeffe	Plea	<input type="checkbox"/> Admitted <input checked="" type="checkbox"/> Not admitted
Offence	<p>Law 9.12 of the Laws of the Game</p> <p>A player must not physically or verbally abuse anyone. Physical abuse includes, but is not limited to, biting.</p>	<p>SELECT: Red card <input type="checkbox"/> Citing <input checked="" type="checkbox"/> Other <input type="checkbox"/></p> <p>If "Other" selected, please specify:</p>	
Summary of Sanction	Not applicable as the citing was dismissed.		

HEARING DETAILS

Hearing date	3 August 2021	Hearing venue	Audio-visual link
Chairman/JO	Adam Casselden SC (Australia)		
Other Members of Disciplinary Committee	David Croft (ex-international player for Australia) John Langford (ex-international player for Australia)		
Appearance Player	YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	Appearance Union	YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>
Player's Representative(s)	Richard Smith QC	Disciplinary Officer and/or other attendees	Yvonne Nolan – Designated Disciplinary Officer Joyce Hayes – Disciplinary Coordinator Alan Phillips – BIL Team Manager James Stebbing – BIL General Counsel Jason Leonard – BIL Chairman Eugene Henning – SA Rugby
List of documents/materials provided to Player in advance of hearing	<ul style="list-style-type: none"> – Citing Commissioner's Report dated 1 August 2021 – South African Rugby Union Team Referral to Citing Commissioner dated 31 July 2021 – Referee's Report (Ben O'Keeffe) dated 31 July 2021 – Assistant Referee's Report (Nic Berry) dated 1 August 2021 – Assistant Referee's Report (Mathieu Raynal) dated 1 August 2021 – TMO's Report (Marius Jonker) dated 1 August 2021 – Affidavit of Franco John Mostert sworn 31 July 2021 – Medical Report of Dr Lehlogonolo Jerome Mampane (SA Rugby Team Doctor) dated 31 July 2021 		

	<ul style="list-style-type: none"> - One photographic image taken of a mark on the right forearm of Mr Mostert taken at 8:43pm on 31 July 2021 - Two photographic images taken of a mark on the right forearm of Mr Mostert taken at 10:45pm on 31 July 2021 - Video footage of the alleged incident – Red 18.mp4 - Video footage of the alleged incident – Red 18 – 50 speed.mp4 - Video footage of the alleged incident – Red 18 – 25 speed.mp4 - Video footage of Mr Mostert talking to the Referee – Close Angle (SA referral) - Video footage of Mr Mostert talking to the Referee – Wide Angle (SA referral) - Video footage of the alleged incident (SA referral) - Team Sheet British & Lions 31 July 2021 - Team Sheet South Africa 31 July 2021 <p>In addition to the above material the Judicial Committee also received into evidence:</p> <ul style="list-style-type: none"> - An expert report from Dr Douglas R Sheasby, Forensic Odontologist dated 2 August 2021 - The Player’s reply to the Judicial Committee’s Standard Directions
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SUMMARY OF ESSENTIAL ELEMENTS OF CITING/REFEREE’S REPORT/VIDEO FOOTAGE

Introduction

The Judicial Committee convened a hearing to consider the Citing Complaint made against the Player arising out of a match played between the British & Irish Lions and South Africa on Saturday, 31 July 2021 at Cape Town Stadium, South Africa.

Mr Scott Nowland of Australia was appointed as the Citing Commissioner to this match and cited Mr Kyle Sinckler, the Player (BIL#18) for an alleged offence under Law 9.12 namely, a player must not physically abuse anyone (biting). It was alleged by the Citing Commissioner that the Player inflicted a bite on the right forearm of Mr Franco Mostert (SA#5) in a ruck in the 64th minute of the match.

At the hearing the Player, through his counsel, denied the incident for which he had been cited. It was the Player’s case that as he went into the tackle contact, he was taken around the area of the head/face by SA#5, and thereafter SA#5 initially maintained that ‘hold’ on the Player as they remained on the ground in the ensuing ruck.

The Player contended that he did not inflict a bite onto the arm of SA#5. The Player advanced a case that the “mark” seen on SA#5’s right forearm resulted from the relevant contact between the respective players and was not caused by the deliberate action of a bite from the Player. It was argued that any contact between the Player’s teeth and the skin of SA#5 was inadvertent and occurred during the moving dynamics between the players in the ruck, that is to say, the “mark” resulted from the contact of SA#5’s skin travelling across, or being forced into, the exposed teeth of the Player, who did not wear a gum shield or mouth guard, during the movement of SA#5’s arm and Player’s face in the circumstances of the Player being held and moving about as part of the dynamics of the ensuing ruck.

Given the Player’s concession that the “mark” observed on SA#5’s right forearm could have come from the Player’s teeth the central issue for determination by the Judicial Committee was whether, based on the balance of probabilities, the Player deliberately inflicted a bite on SA#5 or whether it was the unintended consequences of the interaction between the right forearm of SA#5 and the Player’s teeth in the dynamics of the ruck.

Video Footage

From a review of all the video footage the only person who could have caused the “mark” on SA#5’s right forearm in the ruck is the Player. The other players involved in the tackle and subsequent ruck at the time of the alleged incident did not come sufficiently close to SA#5’s right forearm to have caused the “mark”. Whilst not expressly stated by the Player we do not understand this to be in contention and the hearing proceeded upon that implicit understanding.

At the outset it is important to record that there is no video or photographic evidence of the interaction between the Player’s mouth and SA#5’s right forearm at the time of the alleged incident. Nor is there any eye-witness account of that interaction. These are important evidentiary matters to which we will return later.

The video footage shows SA#18, the ball carrier being tackled by the Player. As the ball carrier and the Player go to ground SA#5 and SA#19 enter the ruck to clear out the Player and BIL#5. As part of the clearing out the Player’s head/face is seen to be held by SA#5’s right arm. SA#5’s ‘hold’ around the Player’s head/face is maintained whilst the ruck collapses. At no time can any observations be made of the Player’s mouth coming into contact with SA#5’s right forearm. This can be explained by the dynamics of the ruck and the positioning of different players at different times throughout the ensuing ruck.

What can, however, be clearly seen, just before SA#22 clears the ball from the ruck, is SA#5 pushing the Player’s head in a downward motion as the Player lay on the ground. The reasons for SA#5’s action at this time was explored with him in his oral evidence and is dealt with below. Before SA#5’s action the Player’s face is obscured under the bodies of SA#5 and SA#19 who are positioned above him. SA#5’s right shoulder, and we also infer his right arm, are wedged between the Player’s head area, the torso of SA#18 (who is also lying on the ground) and perhaps the left shoulder of SA#19. As we go on to explain below the interaction between the Player’s mouth and SA#5’s right forearm is likely to have occurred, in our opinion, in those seconds just before SA#5 pushed the Player’s head in a downward motion.

Evidence of Franco Mostert (SA#5)

SA#5 provided an affidavit in which he deposed relevantly, that during the 64th minute of the match he “felt a player from the British & Irish Lions biting” his right forearm. He identified the Player as the responsible party. The video footage of the alleged incident was played to him at the hearing. In his oral evidence he described what he felt “as something really hurting me”, that it was quick and lasted for maybe one to two seconds, that he reacted by pushing the Player’s head towards the ground saying, “Oh you’re fucking biting”. He heard no response from the Player. He could not remember, but agreed from watching the video footage, that it looked like he had a hold around the Player’s neck/face with his right arm at the time he and the Player are seen to sink into the ruck. Understandably, he could not remember where his right arm was relative to the Player’s face. He could not say what his right arm was or was not doing in the dynamics of the ruck.

He accepted that he did not see the Player biting him. Shortly after the ball was cleared from the ruck, he looked at his right forearm and saw a “red dot with teeth marks around it”. He agreed that no teeth marks were visible in the photographs taken of the “mark” after the match. The video footage shows SA#5, shortly after the alleged incident and at different times, looking at his right arm. SA#5 reported the alleged biting incident to the Referee and parts of that exchange can be seen and heard in the video footage including SA#5 showing his right arm to the Referee. SA#5 accepted that he believed he was bitten by the Player because of what he felt on his right forearm and the “mark” he saw on his right forearm.

Evidence of Match Officials

The Referee, Mr Ben O’Keeffe provided a short Referee Report and also gave oral evidence. He did not see the alleged biting incident but acknowledged that it was brought to his attention by SA#5 in the 64th minute of the second half. He said SA#5 showed him a “mark” on his right forearm. He described the “mark” as a discoloured circular arrangement on the lower aspect of SA#5’s right forearm. That was all that he saw in the short time that he looked at it. He did not see any teeth indentations. He said, and the video evidence confirms this, that he could not deal with the incident because he did not see it and it would, therefore, have to be dealt with after the match.

The two Assistant Referees and the TMO provided reports confirming that they did not witness the alleged incident.

ESSENTIAL ELEMENTS OF OTHER EVIDENCE (e.g. medical reports)

Evidence of Dr Mampane

The South African Team Doctor, Dr Mampane (sports physician) provided a medical report and three photographic images of the “mark”. He took a history from SA#5 that an opposition player had bitten his forearm during the match. On examination he found a lesion/contusion (bruise) of the ventral aspect of the right forearm, there was swelling and redness and the lesion measured 30mm x 30mm. He said the lesion was raised, red centrally, painful and showed no evidence of laceration. He drew the conclusion, based on his examination and the history provided to him by SA#5, that the “mark” was caused by a human bite to the forearm. When pressed he candidly acknowledged that he was not sufficiently qualified to express an opinion on the mechanism of contact that caused the “mark” and for that reason he was not prepared to respond to the opinions expressed by Dr Sheasby in his expert forensic report.

Evidence of Dr Sheasby

The Player provided an expert report from Dr Sheasby. Dr Sheasby is a highly qualified and well credentialed forensic odontologist. He has researched and practised forensic odontology for thirty-three years in the United Kingdom. The ambit of his professional expertise is limited to the analysis of marks and injuries caused by the teeth and other mouth parts.

Dr Sheasby is the Honorary Clinical Senior Lecturer in Forensic Odontology, University of Glasgow. He holds a Bachelor of Dental Surgery, Glasgow University and Doctor of Dental Surgery, Glasgow University. He is a Member of the Faculty of Forensic and Legal Medicine.

His doctoral thesis was entitled ‘Forensic Dentistry – Bite Mark Distortion’. He was the co-author of a scientific publication, ‘A Forensic Classification of Distortion in Human Bite Marks’. He was the contributing author on ‘Bite Marks’ in textbooks on Forensic Odontology published in the United Kingdom, India and Switzerland.

He has advised the British Association for Forensic Odontology on ‘Guidelines for Good Practice in Bite Mark Investigation and Analysis’. He is a Past President of the British Association for Forensic Odontology. He advises the Royal College of Paediatrics and Child Health on bite marks in child protection cases.

Dr Sheasby was provided with three electronic photographic images taken of the “mark” at 8:43pm and 10:45pm on 31 July 2021 together with a copy of Dr Mampane’s medical report. Dr Sheasby was asked

to express an expert opinion as to the mechanism of contact that caused the “mark” in the photographic images. Dr Sheasby reported as follows:

“Detailed Interpretation of Mark

The mark demonstrates small linear elements that are consistent with superficial contact by the biting edges of human upper or lower front teeth. The mark does not demonstrate the features of the biting edges of individual upper or lower front teeth. Consequently, it is not possible to state with certainty which part of the mark was caused by a specific upper or lower front tooth.

The arrangement of the linear elements is consistent with the very slight movement of the biting edges of upper or lower front teeth on the surface of the skin.

The appearance of the mark on the right forearm of Franco Mostert supports the opinion that the mark was caused by either the very slight movement of the teeth or the very slight movement of the skin or a combination of both mechanisms. It is not possible to identify which of the three possible mechanisms of contact was responsible for the mark.

It is important to note that the mark does not demonstrate any of the features of an incisive bite mark.

The appearance of the mark is consistent with a recent injury.

The degree of soft tissue injury in the mark is consistent with mild force between the biting edges of upper or lower front teeth and the skin.

Conclusions

The mark referred to in the conclusions means the mark on the right forearm of Franco Mostert.

- 1. In my opinion, the mark was caused by superficial contact with human teeth.*
- 2. In my opinion, it is not possible to identify the mechanism of contact that caused the mark.*
- 3. The mark does not demonstrate the features of an incisive bite mark.*
- 4. The appearance of the mark is consistent with a recent injury.*
- 5. The degree of soft tissue injury in the mark is consistent with mild force between the biting edges of upper or lower front teeth and the skin.”*

Dr Sheasby gave oral evidence. He presented as an impressive expert witness. He made appropriate concessions, as you would expect from a witness of his standing. Dr Sheasby was challenged on the expert opinions expressed within his report and whether certain features of the “mark” were consistent with the deliberate infliction of a bite. As part of that challenge various alternative assumptions were put to him. For example, he was asked to assume that SA#5 had seen tooth marks on his right forearm after the alleged biting incident and was asked why it was that those same tooth marks could not be seen in the photographic images. He explained that at the time of injury, particular tooth mark indentations may be present; however, the passage of time results in a smoothing out of the tooth depressions due to the skin's ability to reconstitute its original contour due to its elastic nature.

Importantly, he was asked whether the presence of tooth indentations at the time of injury was, more probably than not, consistent with the deliberate infliction of a bite. He was unable to answer that question in the affirmative. He maintained that the “mark” was caused by either the very slight movement of the teeth or the very slight movement of the skin or a combination of both mechanisms. In his expert opinion, it was not possible to identify which of the three possible mechanisms of contact was responsible

for the “mark”. Importantly, for Dr Sheasby, the “mark” did not demonstrate the features of an incisive bite mark and was, in his opinion, caused by superficial contact with human teeth.

Notwithstanding the various challenges to Dr Sheasby expert opinions, he could not be moved to a position where he would accept, on the balance of probabilities, that the “mark” was caused by the deliberate infliction of a bite.

SUMMARY OF PLAYER’S EVIDENCE

The Player categorically denied that he inflicted a bite on SA#5. The video footage of the alleged incident was played to him. He stated that during the tackle contact and subsequent ruck that SA#5’s right forearm was around his face/mouth and SA#5 was squeezing/grabbing his face/mouth tightly. He said SA#5 had a “good grip” of him. He demonstrated to the Judicial Committee the ‘hold’ that SA#5 had of him during the ensuing ruck. He showed his right arm wrapped tightly around his face/mouth such that his face/mouth were in the crook of his elbow. His right fingers were gripping the left side of his upper neck/lower head area. He variously described the force applied by SA#5 during his hold as “not pleasant”, “very hardly pressed”, “tightly squeezed” and “a lot of pressure”. It was put to him did he react to this unpleasantness by giving SA#5 “a bit of a nip” in order to free himself from SA#5’s grip. The Player rejected this suggestion. He said he did not react by biting SA#5. He said he tried to free himself from SA#5’s grip by moving his head but not in a sudden or jerky type of action. He stated that he could not remember feeling his teeth come into contact with the skin of any player during the ensuing ruck. He said he remembered SA#5 pushing his head down, he did not know why SA#5 did this but he did not react as he wanted to get back into his line. He said these types of things happen in rugby all the time. At about this time he did not hear SA#5 say anything to him like “Oh you’re fucking biting”. The Player did not wear a gum shield or mouth guard during the match.

FINDINGS OF FACT

Regulation 17

Set out below are the applicable regulations relevant to this matter.

Regulation 17.15.1 provides that “the standard of proof for all matters under Regulation 17 shall be on the balance of probabilities.”

Regulation 17.15.3 provides that “At first instance disciplinary hearings, in the event that the Player does not accept that the act(s) of Foul Play which is the subject of the disciplinary hearing warranted the Player being Ordered Off or cited, the burden of proof rests on the Player to show that the referee/citing commissioner was wrong.”

Regulation 17.16.1 relevantly provides that “The Disciplinary Committee shall first determine whether or not the relevant act(s) of Foul Play warranted the Player being Ordered Off or should have resulted in the Player being Ordered Off.”

Under Regulation 17.16.1(b) the Player may “deny that the act(s) of Foul Play warranted the Player being Ordered Off or cited in which case, the Player may seek to show that the decision of the referee or Citing Commissioner was wrong. The Disciplinary Committee or Judicial Officer may review the decision of the referee or Citing Commissioner and the circumstances surrounding it. In any such case, the Disciplinary Committee or Judicial Officer shall not make a finding contrary to the decision of the referee or Citing Commissioner unless they are satisfied, on the balance of probabilities that the decision of the referee or Citing Commissioner was wrong.”

Fact finding process

The allegation of biting made against the Player in the Citing Complaint is a serious allegation. It is one of the most serious allegations that can be made against a player. The seriousness of this type of offending is reflected in the sanctions found in Appendix 1 to Regulation 17. For example, the starting sanction for biting assessed at the low-end on the scale of seriousness is 12 weeks/matches. Obviously, a finding of biting against a player carries with it the real risk of it adversely affecting his or her reputation as a player and as a person more generally.

It is against that background that the serious allegation of biting made against the Player must be proved by clear, cogent and exact evidence. Having carefully weighed the testimony of each of the witnesses and undertaken a close examination of the facts proved as a basis of inference we make the following findings of fact.

First, we find that in the 64th minute of the match the Player's teeth have come into contact, and interacted in some way, with SA#5's right forearm in the ensuing ruck. The result of this interaction left a red circular "mark" 30mm x 30mm in diameter which is recorded in the three photographic images taken by Dr Mampane at 8:43pm and 10.45pm on 31 July 2021.

Secondly, we find that by reason of the Player's teeth coming into contact, and interacting in some way, with SA#5's right forearm SA#5 felt "something really hurting" him and that the duration of this sensation was short, lasting between one to two seconds.

Thirdly, we find that SA#5 reacted to the short painful sensation caused by the Player's teeth coming into contact, and interacting in some way, with his right forearm by pushing the Player's head using his left hand towards the ground saying, "Oh you're fucking biting", to which we find, there was no response.

Fourthly, we find that SA#5 did not witness the Player's teeth coming into contact, and interacting in some way, with SA#5's right forearm, and in those circumstances, we find that SA#5 had no more than a belief, honestly held, that he had been bitten by the Player by reason of the short painful sensation he had experienced in the ruck.

Fifthly, we accept the Player's evidence and find that he did not hear SA#5 saying, "Oh you're fucking biting" which explains why there was no response by him to that comment. We also accept the Player's evidence that when SA#5 pushed his head towards the ground that he did not react because this type of behaviour sometimes occurs in matches with the aim of getting a reaction. We accept the Player's focus, at that time, when the ball had been cleared and the ruck completed, was to get back into his line without wasting energy or time reacting to SA#5's actions.

Sixthly, we find that SA#5 examined his right forearm shortly after the ball had been cleared and the ruck completed and observed a "red dot with teeth marks around it". We find that this reinforced SA#5's belief, honestly held, that he had been bitten in the ruck.

Seventhly, we find that SA#5 complained to the Referee that he had been bitten and showed the Referee a "mark" on his right forearm.

Eighthly, we find that all the Referee saw in the short time that he looked at SA#5's right forearm was a "mark" that appeared as a discoloured circular arrangement on SA#5's right forearm.

Ninthly, we accept the evidence of SA#5, Dr Mampane and Dr Sheasby that there was no laceration to SA#5's right forearm as a result of the Player's teeth coming into contact, and interacting in some way, with SA#5's right forearm.

Tenthly, we accept SA#5's evidence that he saw tooth marks or indentations on his right forearm shortly after the ball had been cleared and the ruck completed.

Eleventhly, we accept the expert evidence of Dr Sheasby that at the time of injury, particular tooth mark indentations may be present; however, the passage of time results in a smoothing out of the tooth depressions due to the skin's ability to reconstitute its original contour due to its elastic nature. In our opinion, this explains why no teeth marks or indentations are present in the photographic images of the "mark" taken some time after the injury. In our opinion, it is also explained, consistent with Dr Sheasby's expert evidence, by the mild degree of force applied to the skin and the relatively short duration (1-2 secs) in which that force was applied. That may also explain why there was no laceration to SA#5's right forearm.

Decision

Having made the above findings of fact, which are largely, if not completely uncontroversial, we now turn our attention to the more controversial issue for determination, namely, whether the "mark" left by the Player's teeth coming into contact, and interacting, with SA#5's right forearm in the ruck was a deliberately inflicted bite by the Player on SA#5 or whether it was the unintended consequences of the interaction between the right forearm of SA#5 and the Player's teeth in the dynamics of the ruck.

This was a difficult question to resolve in the circumstances of this case and the evidence was finely balanced as to the correct outcome. Having given the appropriate weight to all the evidence before us we have reached the conclusion that we could not be satisfied, on the balance of probabilities, that the Player in the 64th minute of the match deliberately inflicted a bite on SA#5's right forearm. We say so for the following reasons.

First, we could not be satisfied, to the requisite standard, that the Player deliberately inflicted a bite on SA#5's right forearm in the absence of any clear video or photographic evidence of the alleged offending.

Secondly, we could not be satisfied, to the requisite standard, that the Player deliberately inflicted a bite on SA#5's right forearm in the absence of any eye-witness account of the alleged offending.

Thirdly, SA#5's genuinely held belief that he had been bitten by the Player was based on nothing more than what he felt and saw on his right forearm. He did not see the Player biting him. By saying that we do not wish to call into question his credibility or reliability as a witness, quite the contrary. However, what he felt and saw can be explained by other means.

Fourthly, based on the evidence of the Player (which is supported by the video footage and was not challenged in any meaningful way by SA#5) it is entirely plausible that the contact between the Player's teeth and the skin of SA#5's right forearm was inadvertent and occurred when the Player was forcefully held by SA#5 around the area of his face/mouth in the tackle contact and ensuing ruck, that is to say, the "mark" resulted from the contact of SA#5's skin travelling across, or being forced into, the exposed teeth of the Player, who did not wear a gum shield or mouth guard, during the movement of SA#5's right arm and the Player's face in the circumstances of the Player being forcefully held and moving about as part of the dynamics of the ensuing ruck.

Fifthly, the persuasive and cogent expert evidence of Dr Sheasby does not allow us to find, to the requisite standard, that the "mark" was caused by the deliberate infliction of a bite by the Player. Dr Sheasby, despite the challenges to his opinions, could not be moved to a position where he would accept, on the balance of probabilities, that the "mark" was caused by the deliberate infliction of a bite.

Sixthly, having already accepted the evidence of SA#5, Dr Mampane and Dr Sheasby that there was no laceration to SA#5's right forearm as a result of the Player's teeth coming into contact with SA#5's right forearm we accept Dr Sheasby's evidence that the "mark" did not demonstrate the features of an incisive bite mark and was, therefore, caused by the superficial contact with human teeth consistent, in our opinion, with the unintended consequences of the interaction between the right forearm of SA#5 and the Player's teeth in the dynamics of the ruck.

Seventhly, and of less evidentiary weight the Player's denial that he inflicted a bite on SA#5.

Therefore, having regard to the totality of the evidence before us we are satisfied, on the balance of probabilities, that the decision of the Citing Commissioner to cite the Player was wrong. Accordingly, the Citing Complaint is dismissed and the Player is free to resume playing rugby.

DECISION

Breach admitted <input type="checkbox"/>	Proven <input type="checkbox"/>	Not proven <input checked="" type="checkbox"/>	Other disposal (please state) <input type="checkbox"/>
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Signature (JO or Chairman)	Adam Casselden SC Chairman	Date	5 August 2021
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