BEFORE THE
INTERNATIONAL CRICKET COUNCIL APPOINTED
APPEALS COMMISSIONER

IN THE MATTER OF	an Appointment of an Appeals Commissioner to determine an appeal against the findings of ICC match referee Michael Procter Esq ("The Adjudicator"), dated 7 January 2008
AND	
IN THE MATTER OF	an adjudicated breach of the ICC Code of Conduct during the second test match between India and Australia on 4 January 2008 at the Sydney Cricket Ground, Sydney, Australia
AND	
IN THE MATTER OF	an appeal by Mr Singh

Before:	Appeals Commissioner The Hon. Justice John Hansen
Appearances:	Mr John Jordan SC, counsel assisting Advocate Mr Vasha Manohar for Mr Harbhajan Singh and the BCCI Mr Brian Ward for Cricket Australia
Hearing Date:	29 January 2008
Decision:	29 January 2008 – Full written reasons 30 January 2008

DECISION

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[1] Mr Singh appeals against the decision of the match referee, Mr Michael Procter, who found him guilty of a charge against the ICC Code of Conduct for

Players and Team Officials, Clause CC Rules of Conduct Level 3, sub-clause 3.3. On being found guilty he was banned from three test matches.

Background

[2] The second cricket test between India and Australia commenced at the Sydney Cricket Ground on 2 January 2008. On 4 January 2008, at the conclusion of the 116th over, one of the Indian batsmen, Mr Harbhajan Singh, patted the Australian bowler, Mr Brett Lee on his backside. Another Australian player, Mr Andrew Symonds, considered it appropriate to intervene on behalf of his team mate. There then followed a heated exchange between Mr Singh and Mr Symonds. Mr Symonds alleged that Mr Singh called him either a "monkey" or a "big monkey". This was reported to the Australian Captain, who considered it his duty to refer it to the umpires. The umpires considered it their duty to report it as a breach of paragraph 3.3 of the Code of Conduct. The matter was referred to the match referee who carried out a hearing which was, by agreement, delayed until the end of the match. Mr Procter after hearing from various witnesses was satisfied beyond reasonable doubt "that Harbhajan Singh did say these words" being "monkey" or "big monkey". Mr Procter went on to say he was satisfied beyond reasonable doubt that the use of the words insulted or offended Mr Symonds on "the basis of his race, colour or ethnic origin".

[3] Pursuant to Clause 11(b) of the Code of Conduct the Indian team manager, Mr Chethan Chauhan, on behalf of Mr Singh, lodged a written Notice of Appeal on January 7, 2008. In accordance with Clause 11(c) the ICC's legal counsel, Ms Urvasi Naidoo, appointed me to hear Mr Singh's appeal. By this time two of the witnesses, the umpires Messrs Bucknor and Benson, had left Australia. Because of the logistical difficulties associated with assembling all witnesses, and because of the intervention of the third and fourth tests, both the BCCI and Cricket Australia requested that I delay the hearing date until after the fourth test. In any event I was satisfied the matter could not be disposed of within the seven days of appointment. This was not simply because of the difficulties associated with assembling the necessary witnesses.

[4] In order to ensure a fair hearing for Mr Singh, I determined in this case that a hearing with the participants present should be organised. This necessitated the appointment of legal counsel, the finding of a suitable venue for such a hearing and obtaining suitable secretarial assistance. Self-evidently, such matters take some time. For those reasons I was content to accede to the request to adjourn the matter to 29 January.

[5] Clause 11(f) of the Code of Conduct reads:

> The process for conducting the hearing shall be left to the discretion of the Appeals Commissioner. Oral representations (either in person or by telephone conference as determined in the discretion of the Appeals Commissioner) should be permitted unless there are good reasons for relying on written submissions only. Where it is available, he shall view video tape of the incident which is the subject matter of the appeal.

[6] In this case I conducted a telephone conference with counsel representing all interested parties. I issued a Minute setting down the procedure to be adopted at the hearing. This involved conducting a hearing De Novo and evidence being adduced from those witnesses who gave evidence before Mr Procter. However, to some extent this was overtaken by events at the commencement of the hearing. The appellant, Mr Singh and the witnesses Messrs Ponting, Symonds, Clarke, Gilchrist, Hayden and Tedulkar had signed an agreed statement of facts that was tendered to the court. I reproduce the statement of facts in the exact form in it which it was tendered.

Statement of Agreed Facts

During the 116th over on Day 3 of the Sydney Test, Harbhajan Singh made friendly contact with Brett Lee. At the end of the over while the umpires were changing ends and the fields was crossing over to their new positions, Andrew Symonds approached Harbhajan Singh and told him that he had no friends amongst the Australians (he admits he used the word 'fuck' or a derivation thereof). Singh used similar language to Symonds and neither took offence at that stage.

However the exchange caused Singh to become angry and he motioned to Symonds to come towards him. Singh then said something to Symonds. There is a dispute as

to what was said. However all of the players who gave evidence to the hearing before Match Referee Procter of what was said between Harbhajan Singh and Andrew Symonds namely, Harbhajan Singh, Andrew Symonds, Mathew Hayden and Michael Clarke, are all clearly of the view that in the circumstances, Harbhajan Singh used language that was (and intended by Singh to be), offensive to Andrew Symonds. Symonds took immediate offence at the language and behaviour of Singh.

After the exchange between Singh and Symonds, Michael Clare spoke to umpire Mark Benson and complained about Singh's behaviour, Clarke then told his captain Ricky Ponting what he had heard. Ponting went to Umpire Benson and told him that he had been informed by Clarke of the use by Harbhajan Singh of offensive language towards Andrew Symonds. On his way back to the slips position Ricky Ponting spoke with Harbhajan Singh, Sachin Tendulkar then approached Ponting and Singh and asked Ponting to allow him to manage the situation.

Ricky Ponting then went into the slips. During over 117 Mathew Hayden informed Ponting that he had heard Harbhajan Singh use offensive language towards Symonds at the conclusion of the preceding over. At the end of Over 117 Ponting went of the field and told the Australian Team Manager (Steve Bernard) about the incident.

Harbhajan Singh (Signature), Ricky Ponting (Signature), Andrew Symonds (Signature), Adam Gilchrist (Signature), Sachin Tendulkar (Signature), Michael Clarke (Signature) and Mathew Hayden (Signature).

[7] It is apparent that while there was acceptance that the exchange between the appellant and Mr Symonds was initiated by Mr Symonds and was heated in that the word "fuck" was used no other details of the language used was given. However it was accepted by all parties that it was and intended to be offensive to Mr Symonds.

[8] I was not prepared to only accept the agreed statement of facts. I required the witnesses to be called.

[9] As a consequence Mr Jordan called those witness who signed the agreed statement other than Mr Gilchrist who was unwell, to give evidence of their recollection of what occurred. It was accepted by all counsel that Mr Gilchrist's evidence was to the effect that he did not hear anything and there was no prejudice to Mr Singh by his absence.

[10] Before the witnesses gave their evidence they all viewed the video. This was an analysis of all available camera angles and included audio from the stump microphone.

[11] It was also accepted by counsel that neither umpire heard anything of relevance and their evidence was not required. Finally it was agreed that there should be no evidence from Mr Anil Kumble who although present in front of Procter was not a witness to the events. Rather he was there in his capacity of captain of the Indian team.

[12] It is apparent that the heated exchange arose because Mr Symonds took exception to the appellant patting the bowler Mr Lee on the backside. I have reviewed the television evidence of what occurred. It is clear that Mr Lee bowled an excellent yorker to Mr Singh who was fortunate to play the ball to fine leg. As he passed Mr Lee while completing a single Mr Singh patted Mr Lee on the backside. Anyone observing this incident would take it to be a clear acknowledgement of "well bowled".

[13] However Mr Symonds took objection to this and at the end of the 116th over he approached Mr Singh telling him he had no friends among the Australians in foul and abusive language. Mr Singh became angry and responded in kind. It was accepted by Mr Symonds that some of Mr Singh's response was in his native language

"MR MANOHAR: I put it to you that apart from the other Indian abuses he said to you the words "teri maki"?

*MY SYMONDS: Possibly, I don't recall, I don't speak that langua*ge.

MR MANOHAR: Thank you.

HIS HONOUR: But you accept that as a possibility, My Symonds?

MR SYMONDS: As a possibility I accept that, yes."

Mr Symonds also gave evidence that in the course of this angry exchange that he initiated and provoked Mr Singh called him "you big monkey".

[14] Mr Symonds appears to be saying that he finds it unacceptable that an opponent makes a gesture that recognises the skill of one of his own team mates. In the transcript he stated:

"MR MANOHAR: You had any objection to that patting on the back?

MR SYMONDS: Did I have an objection to it – my objection was that a test match is no place to be friendly with an opposition player, is my objection."

If that is his view I hope it is not one shared by all international cricketers. It would be a sad day for cricket if it is.

[15] Mr Hayden gave evidence that he was changing his position at slip at the end of the over. While not hearing any other words in the exchange or being able to recall them he also stated he heard Mr Singh call Mr Symonds a big monkey. He was adamant those were the words he heard although he could recall no others.

[16] At about this time Mr Michael Clarke was slowly crossing the pitch from cover to cover. His evidence was that he heard Mr Singh call Mr Clarke a big monkey. He was cross examined by Mr Manohar, counsel for the appellant, as to what he stated in the hearing before Mr Procter. There it was recorded that he stated he heard "something like big monkey". However, his evidence to me was not that this was the use of something similar to "big monkey". Rather he maintained that what he told Mr Procter was that he heard things being said that he did not hear or comprehend which he referred to as "something something something" but then he heard the words "big monkey".

[17] Mr Symonds accepted that Mr Tendulkar of all the participants was closest to Mr Singh. A viewing of the video shows that people were moving around but certainly Mr Tendulkar appears to have been closest to Mr Singh in the course of the heated exchange we are concerned with. Contrary to reports that Mr Tendulkar heard nothing he told me he heard a heated exchange and wished to calm Mr Singh down. His evidence was that there was swearing between the two. It was initiated by Mr Symonds. That he did not hear the word "monkey" or "big monkey" but he did say he heard Mr Singh use a term in his native tongue "teri maki" which appears to be pronounced with a "n". He said this is a term that sounds like "monkey" and could be misinterpreted for it.

[18] Mr Singh himself gave evidence and he denied using the words "monkey" or "big monkey". He said that after he patted Mr Lee acknowledging his good bowling there followed the exchange above initiated by Mr Symonds and that he responded angrily. He accepted he used offensive words including the "teri maki" in his native tongue but he did not use the word "monkey".

[19] When reviewing the evidence it is apparent that following incidents in India there was a little of ill feeling between Mr Singh and Mr Symonds. Mr Symonds felt he had been called a "monkey" which was a racial insult by Mr Singh. Mr Singh for his part said that he never called him such thing. Whatever was actually said it is apparent that they shook hands and there was an agreement. Mr Symonds maintained this was an agreement by Mr Singh not to use this word again. Mr Singh said it was a two way agreement whereby neither of them would speak to each other on the field in such a way. Mr Symonds was not cross examined by counsel for Mr Singh as to the extent of this agreement and whether it was two sided matter. But equally Mr Singh was not challenged as to his version that it was a two way agreement. He said:

"*MR JORDAN: Just one matter, your Honour. Mr Singh, so you felt provoked by Mr Symonds using the work "fuck"?*

MR SINGH: Yes.

MR JORDAN: And you felt provoked by Mr Symonds after shaking hands with you in India using that word on the foot – on the ---?

MR SINGH: Yes.

MR JORDAN: ---cricket field? And you were angry?"

…MR SINGH: Yes, I was angry.

It makes sense to me and it would be more likely that it was a two way agreement that they would not speak on the field and this was initially breached by Mr Symonds' provocative abuse.

[20] Furthermore the note kept of the four hour hearing in front of Mr Procter is a mixture of précis and direct speech of parts of the proceedings, testimony and submissions that were noted down. The first page records appearances and the rest of a four hour hearing occupies less than five and a half pages. Given the informal nature of the hearing and the circumstances pertaining to it this is not surprising and is not a criticism. However, it seems to me in future that particularly for more serious offences under Level 3 and Level 4, it would be better if the referees were able to record a full transcript of the hearing in front of them. But what it meant was that the record was inadequate for the purposes of this hearing which is why I heard evidence from all parties.

Discussion

[21] Under Code of Conduct clause L, sub-clause 2, the Code of Conduct Rules are governed by, and are to be construed in accordance with, the laws of England and Wales. The circumstances of the present case have led to a full re-hearing with the evidence being viva-voce to ensure a fair hearing. That means that I have to reach my own conclusions on the evidence independent of Mr Procter's findings.

[22] Mr Singh was charged with a Level 3 offence. Where relevant the Code of Conduct reads:

Level 3

The Offences set out at 3.1 to 3.3 below are Level 3 Offences. The penalty for a Level 3 Offence shall be a ban for the Player or Team Official concerned of between 2 and 4 Test Matches or between 4 and 8 ODI Matches

…

3.3 Using language or gestures that offends, insults, humiliates, intimidates, threatens, disparages or vilifies another person on the basis of that person's race, religion, gender, colour, descent or national or ethnic origin

[23] It can be seen that this requires the adjudicator, or the Code of Conduct Commissioner appointed to hear an appeal, to be satisfied of two things. The first is that the alleged words were used. The second is that the words "offend, insult, humiliate, intimidate, threaten, disparage or vilify another" on the basis of "race, religion, gender, colour, descent or national or ethnic origin".

[24] Before turning to my evidential findings I consider it appropriate to comment on two other matters.

[25] The appeal document filed on behalf of Mr Singh states that there is no evidence to support the allegations against Mr Singh. This is mainly on the basis that it is contended the evidence of Messrs Symonds, Clarke and Hayden, in particular, should have been rejected. In a sense, because I am conducting a re-hearing this is irrelevant, but I think it is appropriate to comment.

[26] This misunderstands the process required of a fact finder, be it in a jury or a Judge in a Court of law, or someone involved in disciplinary hearings such as we are concerned with here. Finders of fact daily face a situation where there is a conflict of evidence between witnesses on an opposing side of a dispute. In serious criminal matters juries are routinely instructed by the presiding Judge that they can accept everything that is said by a particular witness, or reject it. They are told they may accept some of the evidence, and not other parts. They are also told, in making this assessment, that they can have regard as they think fit to the manner and demeanour of the witnesses as they gave that evidence.

[27] The mere fact of such disputes does not excuse the fact finder from reaching a conclusion. It is a requirement of the finder of fact to consider all of the evidence and then determine which evidence, or which part of such evidence, he, she or they will accept. It is often an invidious exercise, but one that, by necessity, must be taken. In this case it was the obligation of Mr Procter as the match referee, to make findings of fact. In the same way, invidious as it may be, I am confronted by the same obligation in this hearing.

[28] Further, I see nothing in the provisions dealing with the hearing in front of the adjudicator or on appeal that there be independent corroboration of allegations made. Nor would it form part of the compliance with natural justice. The need for corroboration, independent or otherwise, is no longer a feature of the criminal law in many jurisdictions, including for criminal offences. In particular it does not form part of the criminal law of England and Wales, except for perjury. It is the law of that jurisdiction that governs the interpretation of the Code of Conduct provisions. It would be strange if such a requirement is no longer necessary in the criminal law but it applied to sporting disciplinary hearings. I have not been persuaded, nor has it been suggested, that it is a requirement in hearings of this sort.

[29] Put shortly, a decider of fact is required to determine what evidence he or she accepts, regardless of the fact that the evidence is disputed.

[30] The other matter to address is the question of the standard of proof. The Code of Conduct does not provide for a standard of proof. However, assistance can be found in the ICC Anti-Doping Code. That provides as follows:

> **4. PROOF OF DOPING**
>
> 4.1 Burdens and Standards of Proof
>
> ICC shall have the burden of establishing that an Anti Doping Code violation has occurred. The standard of proof shall be whether ICC has established an Anti Doping Code violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases shall be greater than a mere balance of probabilities but less than a standard of proof of beyond a reasonable doubt. Where this Code places the burden of proof upon the Cricketer alleged to have committed an Anti Doping Code violation to rebut a presumption or

> establish specified facts or circumstances, the standard of proof shall be on the balance of probabilities.

[31] The use of drugs is the scourge of modern sport. The ICC Anti-Doping Code is a regulation put in place to discipline those participating in cricket who use drugs. Such offending is properly considered extremely serious. In my view it is at least as serious, and carries more opprobrium, than the offences set out in Levels 1, 2 and 3 of the Code of Conduct Section CC. As a matter of practicality it also seems to me that it would be wrong to import into the Code of Conduct a different standard of proof than that which applies under the ICC's anti-doping regulations. Consistency of approach is important to players, officials, and those required to deal with allegation of breaches. As Justice Sachs noted in the Ganguly decision referred to earlier, "There is inevitably a patchwork quality to the quilt of conglomerate norms. The Code of Conduct itself has this piebald character."

[32] All this, highlights the need for consistency between the various parts of the rules that deal with matters of discipline. It is trite that there is a disciplinary aspect to the Anti-Doping Code. As well Ebrahim J in the only anti corruption hearing pursuant to the Code of Conduct C4 applied such a standard. It would be an anomalous situation if different standards of proof applied to different ICC disciplinary regulations.

[33] Accordingly, I propose to adopt the standard of proof set out in 4.1 of the Anti-Doping Code as applicable to offences alleged to have occurred under the Code of Conduct. That means it is a standard between the civil standard of the balance of probabilities and the criminal standard of beyond reasonable doubt.

[34] Both these standards of proof resonate with lawyers and may be meaningful for lay people. Indeed juries in both criminal and civil jurisdictions have to grapple with those standards on a daily basis in various legal systems, but with the assistance of instructions from a Judge.

[35] The balance of probabilities standard simply means that a finder of fact is satisfied an event occurred if that finder of fact on the evidence considers the

occurrence of the event was more likely than not.[1] That is an easier concept than beyond reasonable doubt. This latter criminal standard has troubled juries for some time. Reasonable doubt can be said to be:

> The starting point is the presumption of innocence. You must treat the accused as innocent until the Crown has proved his or her guilt. The presumption of innocence means that the accused does not have to give or call any evidence and does not have to establish his or her innocence.
>
> The Crown must prove that the accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence.
>
> In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him or her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him or her not guilty.[2]

[36] It can be seen that there is a significant divide between the civil and criminal standards. Exactly where on the continuum between the two one should fix in applying the applicable standard here is unclear.

[37] However, I consider assistance can be gained from concepts that are well understood by those versed in civil litigation. This generally occurs with allegations of criminal matters in a civil court proceeding. It has sometimes been referred to as providing a sliding scale standard. That is not the case.

[38] In the case cited at footnote 1, Lord Nicholls described this as follows:

> When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious

[1] *Re H and others (minors)* [1996] 1 All ER 1. See also *Spellacey v Solicitor-General* (2003) 21 CRNZ 140 at 153
[2] *R v Wanhalla* [2007] 2 NZLR 573

> the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established… This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.[3]

[39] This concept from English civil law is in fact reflected in the Anti-Doping Code set out above. Its essence is contained in the last part of the second sentence: "bearing in mind the seriousness of the allegation which is made".

[40] This of course does not assist as to exactly where on the continuum between the balance of probabilities and beyond reasonable doubt the applicable standard lies. I take it to be that the finder of fact does not need to be sure or satisfied beyond reasonable doubt but it is not sufficient if his mind is swayed only to the extent of the balance of probability, in other words, to the comfortable satisfaction of the person hearing the matter. I am also satisfied that the more serious the allegation made against a player or official, the more improbable the event so the evidence must be stronger to establish it. In this case, with a Level 3.3 offence alleging a racist comment, the allegation is clearly of a very serious nature. In such a case it requires strong evidence to establish it. For the reasons that follow it is tantamount to the criminal standard.

[41] An instructive decision on the English law is that of *The Queen on the application of Dr Harish Doshi v the Southend-On-Sea Primary Care Trust*[4].

[3] See also to like effect *Khawaja v Secretary of State for the Home Department* [1983] 1 All ER 765
[4] (2007 EWHC 1361 (Admin) (the High Court of Justice, Queen's Bench Division)

[42] There Holman J was concerned with the appropriate standard of proof to be applied by the Family Health Service Appeal Authority. He usefully reviewed a modern authority and summarised the present state of the law in England as follows:

From this review of the authorities I conclude as follows:

> *(1) The proceedings before the tribunal were civil in character and the starting point is "in principle" (Lord Steyn in McCann) the civil standard. However,*
>
> *(2) There is no rule that in civil proceedings the standard must be the civil standard (Lord Hope in McCann) and there is clear authority that in certain circumstances (described by the Court of Appeal in N as "exceptions to the general rule") the criminal standard should, or in some cases must, be applied.*
>
> *(3) In disciplinary proceedings concerning the legal profession it is the law that the criminal standard must be applied: Campbell v Hamlet. However, this is not necessarily a rule of wider and more general application.*
>
> *(4) In cases against doctors the approach is more discretionary (McAllister at page 399B "…where the events giving rise to the charges would also found serious criminal charges it may be appropriate that the…standards of proof should be those applicable to a criminal trial…") It is relevant that the rules are silent (McAllister at page 399D and E) and what is of prime importance is that the proceedings should be fair (McAllister at 399C).*
>
> *(5) Although there are only two standards (viz the civil and the criminal standard), the practical application of the "flexible approach" to the civil standard means that they are likely, in certain contexts, to produce the same or similar results: N at 699H echoing Lord Bingham of Cornhill in B v Chief Constable of Avon and Somerset*

Constabulary; Lord Steyn in McCann at 812F; Lord Hope in McCann at 826E; and the Privy Council in Campbell v Hamlet at paragraph 25.

[43] What this means is that the more serious the allegation the more certain the fact finder must be of the evidence which is relied on. As the allegations approach those equating to criminal behaviour so the standard of proof will equate with the criminal standard. While this is a civil proceeding and while the offences under 3.3 are not criminal offences they are to some extent mirrored in various racial vilification and anti hate legislation now common in many jurisdictions.

[44] In effect I need to "be sure" in relation to the allegations and if I am left with an honest and reasonable uncertainty then I must make a finding favouring Mr Singh.

[45] In this case there is a direct conflict as to whether or not the words were said. Mr Symonds accepted that in at least part of the heated exchange Mr Singh used his native tongue. Both Mr Singh and Mr Tendulkar gave evidence that he used words in his own language that were similar to monkey. On the other hand the three Australian players consider they heard the words "big monkey".

[46] Mr Procter also noted in his decision that he did not consider the umpires or Mr Tendulkar were in a position to hear the words. I have of course had the advantage of seeing extensive video footage which in fact establishes that Mr Tendulkar was within earshot and could have heard the words. Indeed it is now clear Mr Tendulkar did hear the exchange but not the words alleged.

[47] I accept that Messrs Hayden, Clarke and Symonds are satisfied themselves that they thought they heard the words "big monkey". Indeed it is clear from the audio material they immediately confronted Mr Singh in this regard. I am satisfied that Mr Singh denied this to Umpire Benson. But we are in a situation where there are cultural, accent and language differences and where it is accepted that some of Mr Singh's remarks were in his own language. Mr Hayden and Mr Tendulkar in particular were impressive witnesses. But their evidence as to what was said by Mr

Singh is completely at odds. Mr Tendulkar said there was offensive words in Mr Singh's native tongue and he also heard abusive language in English between the two. Mr Hayden says he heard the words "big monkey" but could not recall for the court any other words that were said by either party. I remind myself that an honest witness remains a witness who may be mistaken. In my view there remains the possibility of a misunderstanding in this heated situation. As well it is not without significance that the Australian players maintain other than Mr Symonds that they did not hear any other words spoken only the ones that are said to be of significance to this hearing. This is a little surprising in the context where there was a reasonably prolonged heated exchange. Indeed Mr Clarke went so far as to say that he did not hear Mr Symonds say anything. Given Mr Symonds' own acceptance that he initiated the exchange and was abusive towards Mr Singh, that is surprising. This failure to identify any other words could be because some of what they were hearing was not in English.

[48] As I say the standard to be applied by me is a high one I have to be sure that the words were said. That they were probably said is insufficient. I have not been persuaded to the necessary level required that the words were said. I am left with an honest uncertainty as to whether or not they were said given the possibility of misunderstanding through different languages, accents and cultures, and the fact that none of the Australian players appeared to hear any other words said by Mr Singh. It is quite apparent on any view of the evidence that more than the alleged words were said in the course of the exchange.

[49] The video evidence and the stump microphone do not take the matter much further. They certainly pick up some words and appear to include, although this is not conclusive, Mr Symonds saying "are you calling me a monkey". There are also words from Mr Hayden to the effect that "it doesn't matter mate it's racial vilification mate it's a shit word and you know it". But they do not assist in any way in determining what Mr Singh himself said. Nor can his response to Mr Symonds or Mr Hayden be gauged. What is apparent when umpire Benson put the issues to him he immediately denied them.

[50] Accordingly, I am not satisfied that it has been established to the requisite very high standard that the words were said and on that basis a charge under 3.3 is not made out.

[51] There is another reason why I consider a charge under 3.3 fails. Counsel made submissions on the interpretation of 3.3. Mr Manohar suggested it was similar to a criminal offence and it was necessary to prove intent. I do not think that is the case. I am in agreement with counsel assisting me and with Mr Ward for Cricket Australia. That is that the clause requires an objective interpretation and an objective assessment of what occurred. To that extent it may be usefully likened to public disorder offences that are familiar in most jurisdictions (ie offensive language is to be gauged by its effect on a reasonable or ordinary person).

[52] I am fortified in this view by the Guidelines for Offences in their latest edition attached to the Code of Conduct. In the notes to 2.8 it is stated that "this offence is not intended to penalise trivial behaviour. The extent to which such behaviour is likely to give offence shall be taken into account when assessing the seriousness of the breach." In the notes to 3.3 it states again that "in assessing the seriousness of a breach the degree to which the behaviour was likely to give offence (to the ordinary person) and whether it was directed specifically towards any person or persons shall be taken into account."

[53] In my view it is therefore necessary to determine under 3.3 whether the "ordinary person" would be "offended, insulted, humiliated, intimidated, threatened, disparaged or vilified" on the basis of "their race, religion, gender, colour, descent, or national or ethnic origin" by the words that were said.

[54] Furthermore, the behaviour must be looked at in context. Such events are always contextual and the language or gestures referred to in 3.3 cannot be looked at in isolation and need to be considered in the context of the overall behaviour.

[55] I have set out above the agreed statement of facts. There it was accepted by Mr Singh that he intended to be offensive towards Mr Symonds and Messrs

Symonds, Hayden and Clarke were of the view that in the circumstances that language was offensive.

[56] In the course of submissions I raised directly with counsel for Cricket Australia Mr Ward what was the level of offence that Mr Symonds took from what was said to him. He confirmed that Mr Symonds took the language to be offensive and seriously insulting but did not consider it fell under the requirements of 3.3.

[57] Given that is the view of the complainant it is hard to see how the requisite elements of 3.3 could be satisfied. However, given it is an objective interpretation that is not the end of the matter. I must consider if the "ordinary person" would have been offended in a 3.3 sense. That again requires a look at context. Mr Singh had innocently, and in the tradition, of the game acknowledged the quality of Mr Lee's bowling. That interchange had nothing to do with Mr Symonds but he determined to get involved and as a result was abusive towards Mr Singh. Mr Singh was, not surprisingly, abusive back. He accepts that his language was such as to be offensive under 2.8. But in my view even if he had used the words "alleged" an "ordinary person" standing in the shoes of Mr Symonds who had launched an unprovoked and unnecessary invective laden attack would not be offended or insulted or humiliated in terms of 3.3.

[58] So on that alternative basis I would also have been satisfied that the requirements of 3.3 were not met. So as to summarise that ground. Firstly, Mr Symonds through counsel accepts he was not offended in a 3.3 sense. Secondly on an objective basis I do not consider the response transgressed against 3.3.

[59] As a consequence of my findings that a charge pursuant to 3.3 is not made out I consider that the evidence does warrant a charge under 2.8. I have put that charge to Mr Singh and he has pleaded guilty to it. I received submissions on penalty from counsel assisting Mr Jordan and submissions in mitigation from Mr Manohar. I accepted Mr Jordan's submission that while there was one previous offence there was significant mitigation in this case through provocation making the offence at the lower end. I concurred in that and imposed the minimum fine.

Concluding Remarks

[60] Clause C1 of the ICC Code of Conduct for Players and Team Officials requires that:

> "1. Players and/or team officials shall at all times conduct play within the spirit of the game as well as within the laws of cricket…"

[61] It can be seen that spirit of the game is an overriding consideration in the context of the Code of Conduct. Sensibly the Code of Conduct does not attempt to define the spirit of cricket. Frankly it is an amorphous term that would take a more elegant pen than mine to define. But it is not without coincidence that the game gave rise to the term "that's not cricket" to refer to behaviour, that while not necessary illegal, falls below reasonable accepted standards. Of course the game has changed considerably since that term was coined. It has become professional and in each match much is at stake individually and collectively for players and teams. The game has become more widespread invoking, in some countries, a much higher degree of passion than in others. There are also cultural differences between players from countries with different ethnic and cultural backgrounds. But it seems to me that all players, officials and spectators instinctively understand what is meant by the term "the spirit of cricket". It needs to be said that the greater good of the game is more important than the outcome of any particular match, no matter how important that particular game is to the participants. I have no doubt that the participants in this game have reflected long and hard since its conclusion. Their actions do not reflect well on them or the game.

[62] There has been considerable publicity relating to the allegations against Mr Singh and this appeal. Many reports have suggested that if the appeal is unsuccessful the balance of the tour would be called off or would at least be in jeopardy. Mr Manohar has assured me that that is not the position of the BCCI and it is no more than media speculation and exaggeration. I accept Mr Manohar's assurance.

[63] Many people reading such media reports could well have thought that they were designed to pressure the Code of Conduct Commissioner into a predetermined

result. In the event the result has been favourable to Mr Singh. But that is as a result of my consideration of the evidence and the law applicable to this case. This is a civil case and while in normal circumstances an adjudicator would not go beyond facts agreed between the parties in this case I required all the witnesses as to the exchange to give evidence and be cross examined.

[64] On a personal level I can say that I have not felt under any pressure because of such media reports. In any event as a Judge who has taken the required judicial oath I would never be influenced or succumb to any such pressure, real or imagined.

[65] Obviously the media have not invented these statements. They must be sourced from someone. To my mind such statements do a serious disservice to the game. The Code of Conduct for Players and Team Officials is a set of regulations put in place after input from and with the agreement of all ICC members. It is a robust Code designed to ensure a fair hearing for players. Code of Conduct Commissioners are independent of the ICC and carry out their appellant functions independently. It is incumbent on members of the ICC to abide by this process and allow it to run its full judicial course before making comments or taking actions. It is after all, as I have noted, a consensual code that those members have agreed to and should abide by.

[66] I need to add something about the penalty I imposed. In imposing that penalty I took into account Mr Singh's previous transgressions as advised to me by counsel assisting Mr Jordan. I was told that Mr Singh had one infraction in April 2003 for what was the equivalent to a 2.8 offence under the present Code. That was for an abusive comment made to the umpire when he was fined 50% of his match fee. That was the only infraction that Mr Jordan had been advised of by the ICC. After the penalty was announced I was made aware that in fact there were three further matters I had not been informed of. One was under the old Code of Conduct in 1998. It was the equivalent of a Level 1 offence under the present Code and involved ordering a batsman to the pavilion. He was fined half of his match fee. There was a similar offence in November of 2005 when he was fined 25% of his match fee. Of more moment was a conviction, along with other players, in November of 2001. In the course of a test match Mr Singh was found guilty of showing dissent at the umpire's

decision and attempting to intimidate the umpire. He was fined 75% of his match fee and given a suspended ban for one test match.

[67] The 1998 matter was overlooked because apparently offences under the old Code of Conduct are not included in the ICC database. The November 2001 offence was overlooked because more than one player was convicted and the entry in the database was under another player's name. It was simply human error that led to the Level 1 offence in November 2005 not being made available. None of these three offences were advised to Mr Jordan and because of that he was not in a position to advise me of them. Other counsel did not alert me to this information during the sentencing process. These matters should have been placed before me. None of them of course involve racist allegations. Leaving aside for the moment the offending in November of 2001, if I had been fully informed of all the other offences, given the level of provocation in this case, my penalty would have remained the same. However, if I had been aware of the serious transgression in November 2001 I would have required more extensive submissions as to the offence in mitigation which could have led to a different penalty. Overnight I have given earnest consideration to the Code of Conduct to see if it empowers me to reopen the sentencing process. Regrettably I have concluded that I cannot do so and the penalty imposed by me must stand. At the end of the day Mr Singh can feel himself fortunate that he has reaped the benefit of these database and human errors. But judicial experience shows that these are problems that arise from time to time.

[68] It is apparent from the contents of my decision that this hearing was vastly different from that that occurred in front of Mr Procter. I have had a full hearing with the assistance of counsel with cross examination from counsel representing Mr Singh and Cricket Australia. I also had the advantage of additional video and audio material. I have had considerable assistance from counsel by way of legal submissions. The fact that I have reached a different conclusion from Mr Procter does not reflect on his decision or the process he adopted. The reality is it was a quite different hearing from the one that occurred in front of him.

[69] I wish to express my thanks to counsel for their assistance. I also wish to thank the Federal Court of Australia, and in particular the Judges and staff of the

South Australian Court, who so generously made their fully equipped No 1 court available to us. Without that assistance this hearing would have been much more difficult.

[70] I should add this. I have read some of this morning's media reports of the outcome of the hearing. I trust now that the full facts are known and my reasons are available there will be a greater degree of proportionality and rationality. I wish to make it quite plain that as a Code of Conduct Commissioner appointed by the ICC I am independent of that body. I have brought that independence to this hearing. It was not the ICC that reduced the charge against Mr Singh from a level 3.3 offence to a 2.8. That was my decision and my decision alone. I made that decision on the basis of my factual findings and my legal interpretation of the Code of Conduct. An interpretation I may add that counsel were by in large in agreement with. I also wish to disabuse the media of any notion that there was some "sort of deal". While I was tendered an agreed statement of facts at the commencement of the hearing, I still insisted on counsel assisting me to call the players that could give relevant evidence and to hear that evidence viva-voce and to have them cross examined. The decision that I have reached is based on my findings on that evidence. It is incorrect to suggest that there was some sort of an agreement reached between Australian and Indian cricket authorities that I simply rubber stamped. I also wish to add that while I was aware of the media furore surrounding this matter no-one has attempted to apply direct pressure to obtain an outcome. In any event as I said earlier it would be a breach of my judicial oath, and a dereliction of duty as an independent Code of Conduct Commissioner, to succumb in any way to such pressure. I repeat I have independently reached my decision based on the evidence as I have found it to be and in accordance with the applicable standard of proof and interpretation of the Code of Conduct Regulations.