

Judgment 20/2004

**Glen Michael Nicolle – Royal Court –
23 April, 2004**

Criminal appeal from the Magistrates Court – conviction for breach of the peace, resisting police and assault on police – review of the evidence – ingredients of the offence of breach of the peace – whether the verdict was unreasonable or could not be supported having regard to the evidence – appeal dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 23rd day of April, 2004 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; sitting alone.

In the action of THE LAW OFFICERS OF THE CROWN against GLEN MICHAEL NICOLLE (“the Appellant”) to pursue the appeal of which the said Nicolle gave notice against the conviction imposed upon him by the Magistrate’s Court on the 5th day of February, 2004;

WHEREAS on the 22nd day of April, 2004 THE COURT having heard Advocate N. J. Barnes for the Appellant and Advocate P. Robey for the Crown thereon DISMISSED the Appeal, written reasons for the decision to be handed down on Friday 23rd April, 2004;

THE COURT this day handed down written reasons in the terms attached hereto.

S. M. SIMMONDS
Her Majesty’s Deputy Greffier

ROYAL COURT OF GUERNSEY

Before Geoffrey Robert Rowland D.B.

Appeal Against Conviction

**22nd April 2004
Glen Michael Nicolle**

1. On 22nd April I dismissed the Appellant's appeal against conviction. I indicated that I would deliver a judgement setting out my reasons for so doing or if Counsel and the Appellant so advised me I would hand down my reasons. These are my reasons.

Introduction

2. Glen Michael Nicolle was arrested soon after midnight on Monday 6th October. He was arrested by PC Chart for conduct likely to cause a breach of the peace.

Background

3. He was arrested outside 13 Old Mill, St Martins a dwelling of which his partner, Miss Bates, was the tenant. There she lived with her two children then aged 3 and 9 years respectively. Apparently the Appellant is the father of one of the children. Mr Nicolle had lived there with Miss Bates for a few months. There had been occasions when Miss Bates had excluded him from the dwelling and the Appellant appears to have accepted this as a feature of his up and down relationship with Miss Bates. Their relationship had been on/off over a period of some seven years.

4. There was much evidence that was not disputed. It was common ground that on the night in question Mr Nicolle had arrived outside the dwelling late on the Sunday evening, sometime after 10.30 p.m. He and his companions were already in a state of some inebriation. Miss Bates was not prepared to admit him or them because of his and their conduct. She saw fit to call the Police.

5. Police Sergeant Greening arrived at about 11.20 p.m. For him it was a very busy evening and he was to remain only until such time as he felt the other officers were in a position to resolve matters. At much the same time PC Chart arrived. PC Nichols arrived at 12.05 a.m. The Appellant was trying to gain access through the front door. The Officers intention was to calm matters down and if possible avoid arresting anyone. The Appellant and his two companions eventually left having been warned by Officers not to return. It was shortly before 12.30 a.m. when they and the Officers left.

6. Subsequently the Appellant despite the Police warnings returned to the property with his friends. This time the Appellant went to the back door where he sought admission. Again Miss Bates was not prepared to admit him into the dwelling. Miss Bates once again telephoned to the Police. This caused PC Chart, PC Naftel and then PC

Nichols to return to the property. PC Chart estimated that when he arrived for the second time it was only 10 minutes or so after he had left.

7. PC Chart very soon after his second visit to the property arrested the Appellant. PC Wolfe arrived on the scene just before PC Chart arrested the Appellant. Following the arrest of the Appellant the Police Officers alleged that the Appellant resisted the three Officers in the due execution of their duty and that he also assaulted PC Wolfe in the due execution of his duty.

Conviction

8. On 5th February 2004 the Appellant pleaded not guilty in the Magistrate's Court to each of the offences but was found guilty of all three.

9. He appealed. The Appellant's appeal grounds were that his behaviour at the property on the second occasion did not constitute conduct that was likely to cause a breach of the peace and therefore his arrest was unlawful. The Appellant contended that consequently he ought to have been found not guilty of not only that offence but as a consequence also the other two offences.

10. Mr Barnes represented the Appellant in the Magistrate's Court. On appeal Mr Barnes appeared for the Appellant and Mr Robey for the Law Officers. Both Mr Barnes and the Law Officers had submitted skeleton arguments. They developed those arguments before me and in attributing submissions to them I combine the submissions made in the skeleton arguments with the oral submissions made on 22nd April.

11. I now turn to the grounds upon which the Appellant relied. I summarise them thus:

12. **Firstly** – the Appellant had been living in the dwelling with Miss Bates. His presence at the property was therefore lawful. Her actions constituted an unlawful attempt to exclude him unless his conduct was such that it was reasonable to apprehend that he might cause a breach of the peace.

13. Mr Robey submitted that it appeared that the Appellant was a licensee of Miss Bates. That licence had been revoked on what I have referred to as the first occasion.

14. **Secondly** – that there was no evidence of any serious imminent threat to the peace to justify the arrest. In particular he stressed that Miss Bates had no apprehension concerning her own safety.

15. Mr Barnes cited *Foulkes v the Chief Constable of Merseyside Police* (1988) 3All ER 705 and further contended that none of the six conditions set out in *Bibby v Chief Constable of Essex* (2000) Justice of the Peace Reports 164 page 297 had been satisfied.

16. Mr Robey sought to distinguish the two cases cited by Mr Barnes, and asserted that the arrest was lawful. He relied principally on the judgement of Watkins LJ in *R v Howell* (1952) 1QB 416 as applied to the totality of the conduct of the Appellant at the property that night.

17. I now consider these arguments in turn:

Property rights

18. The rights of Miss Bates in the property were referred to only briefly in evidence before the Assistant Magistrate. It emerged that Miss Bates was the tenant of the property. She was therefore, in my view, free to deny the Appellant access when it suited her and that night she had made it clear that she was not going to permit the Appellant access into the dwelling and did not even want him on the property that night.

19. I therefore concur with Mr Robey that there was no evidence that the Appellant had any right to enter the dwelling except with the express or implied or tacit permission of Miss Bates.

20. The Appellant was fully aware that on the evening in question Miss Bates had not been prepared to permit him to enter the dwelling. She required him to leave the property. That was at the heart of the matter. Whilst he may have entered the garden and approached a door of the dwelling on the first occasion with implied permission of Miss Bates his right to remain there ceased when Miss Bates indicated to him that he would not be admitted and should go away.

21. Whatever may have been his property rights, he should not, particularly in view of Police warnings, have returned there that night. His presence on the second occasion was in blatant disregard of the warning not to return.

22. I now turn more specifically to the facts which led to the Appellant's arrest which emerged in evidence at trial.

Miss Bates

First Occasion

23. Miss Bates was adjudged by the Assistant Magistrate to be “a very good witness” (p.43F).

24. Miss Bates emphasised that the Appellant and his friends had been told that “they weren't allowed to come in” (p.3). She has also testified that she had told the Appellant “you can just go off and come back tomorrow”, she had said this to him “because he had had too much to drink” (p.3). Her two young children were already in bed a fact which would not have surprised the Appellant given the lateness of the hour. In her words the Appellant and his friends “were just knocking and shouting at the door.... they started kicking the door.... I thought they're going to break the door” (p.4).

25. She had then contacted the Police. The Police had arrived and eventually the Appellant, his friends and the Officers had left the property.

Second Occasion

26. The Appellant had then returned. In her words “he wanted his tablets from upstairs and he was going to chuck something at the door” – (p.4)

27. She had specifically heard the Appellant shouting. She also testified that with reference to the Appellant that “he threw my son's bike at the door and broke my son's bike and was head butting the door and trying to get me to let him in....”. (p.4).

28. This conduct on the part of the Appellant caused her once again to contact the Police and ask them to return to the property.

29. She said she was “a bit unnerved” (p.4). She emphasised that she “wanted to get rid of him” (p.5).

30. When she was cross-examined by Mr Barnes he suggested that she had called the Police because she was concerned about the Appellant's well being rather than her own safety. Miss Bates whilst not denying that her concern for the Appellant was a factor also emphasised clearly that she had told him to go away and not come back until the next day. She said “I didn't want him in the house” emphasising that she did not want her two children woken up and she did not want the two children to see him in the condition he was (p.7).

31. It is clear from the evidence she gave that she was concerned about the property and about her children as well as having measured concern for the Appellant with whom apparently she had an on/off cohabitation relationship (p.7).

32. If Miss Bates' evidence was to be believed by the Assistant Magistrate then there was evidence that his conduct on the first occasion may have constituted a breach of the peace and most certainly on the second occasion constituted a breach of the peace. On the second occasion he was seeking to gain access to the dwelling once his permission to enter the property had been revoked and property, both realty and personalty was at risk, indeed a bike was damaged.

Police Sergeant Greening

33. PS Greening testified on what I have termed the first occasion that the Appellant was "extremely inebriated" (p.8) and that pressure on Police manpower and particularly on him that evening meant that he did not want to arrest the Appellant. He was to say in evidence that his actions were "probably far more lenient than normal" (p.9). He had requested the Appellant to leave the area.

34. When as Custody Officer he saw the Appellant on his arrival at the Police Station at 1.00 a.m., some 25 minutes after he had been arrested "his eyes were glazed, his speech was slurred and he smelt heavily of intoxicants and he was quite clearly drunk" (p.8).

PC Nichols

35. PC Nichols testified that having arrived at the property at 12.05 a.m. he had spent some 20 minutes there. Together with PC Chart and Sergeant Greening they had spoken with the Appellant for some considerable time. PC Nichols believed that the Appellant whilst they were there had calmed down (p.14). The Appellant had been advised that should he re-attend at the property then he would be arrested for conduct likely to cause a breach of the peace (p.15).

36. PC Nichols had returned at 12.40 a.m. PC Chart and PC Naftel were there. The Appellant was by the back door of the property and had been arrested.

PC Chart

37. PC Chart gave evidence that he was called to the property because the Appellant was reported to be kicking in the front door of the house (p.19). He had, on this first occasion arrived at about 11.20 p.m. He was to stay there for about an hour. He saw that the Appellant was trying with two friends to gain access to the dwelling.

38. The Appellant was drunk. PC Chart stressed that on a number of occasions the three men were told that if they returned they would be arrested.

39. Having left the property he was called back after about 10 minutes. PC Chart had asked the Appellant why despite warnings from Officers the Appellant had returned to the property. The Appellant claimed to have returned in order to get medication which he needed (p.30). PC Chart said that he was satisfied from what he had heard on the first occasion that the Appellant had received sufficient medication for the time being. PC Chart evidently did not accept that the medication need contended by the Appellant was a valid requirement at that time. He arrested the Appellant at 12.35 a.m.

40. PC Chart was clear that Miss Bates "who is the tenant of the house.... didn't want him back in because he was drunk" (p.23). Having spent "an hour talking, explaining, pleading and asking" the Appellant to leave the property the Appellant despite warnings had returned. He said that "finally we were driven to arrest him" (p.24).

PC Naftel

41. PC Naftel attended at about 12.35 a.m. He had not been there on the first occasion. The Appellant was at the rear of the house with two friends. The Appellant was “trying to gain admission into the house” (p.25). He was aware that the Appellant “was not welcome”. He heard PC Chart tell the Appellant that he was being arrested for conduct likely to cause a breach of the peace. He acknowledged at that time that the Appellant “was reasonably cooperative” (p.25). PC Naftel said with reference to the Appellant that he “had to prevent him from opening the back door” (p.26). He believed that the Appellant was drunk. The Appellant “clearly wanted to get into the house.. he was being abusive to the Police Officers” (p.26).

PC Wolfe

42. PC Wolfe arrived at about 12.35 a.m. He saw PC Chart trying to persuade (the Appellant) to leave the area, but he seemed unwilling to do so. As he put it “they began to become obstructive and eventually he was under arrest” (p.29).

Glen Nicolle

43. The Appellant in his evidence referred to the first occasion when Officers had been called to the property that evening. A Police Officer had gone into the house and brought out a tablet. In his words “he did bring me one out and ... told me to leave the area, which I did”(p.33).

44. He went on to say that (emphasis provided - “I only went back the second time because I live there, that’s the only reason I went back and also I was supposed to take two medications a night. I was given one so I was going to go back home, have a second one and stay in for the night” (p.33).

45. Referring (p.33) to his friends he said “I was just going to go in and they were going to leave”. He could not remember who had arrested him. He once again admitted that he had told an Officer “all I want to do is to go into my house” (p.33). On this night he had nowhere else to go (p.35).

46. He admitted to being slightly drunk and recollected that Miss Bates on the first occasion had told him “I don’t want you in here”(p.35). He accepted that he had been told by Officers “to leave the area now” (p.36). He acknowledged that Miss Bates had said “the kids are asleep” and he thought that his intention to go into the property with his friends and have a couple of drinks was “a bit out of order” (p.36).

47. After leaving the first time he had had a “couple more drinks” at his friends house (p.36). He had then “thought I had enough and.... I am going home” (p.37).

48. He had gone to the back door of the property and Miss Bates did not let him in. He denied head butting the door on that occasion and also denied throwing a child’s bike at the door of the property. He did not accept that he had been shouting before he was arrested (p.37).

49. It was clear from his evidence that he was not merely seeking further medication with the intention, had he received it, of leaving the property. He was clearly intent on entering the dwelling and remaining there despite the fact that he knew clearly that this would not be acceptable to Miss Bates.

CASES CITED BY COUNSEL

Foulkes v the Chief Constable of the Merseyside Police

50. The facts of this case heard in the English Court of Appeal, Civil Division were as follows:

51. As a result of a family dispute in the early hours of the morning the Police were called to the Foulkes household. They escorted away the son and daughter who had been playing music loudly to the annoyance of Mr Foulkes, their father. Later that morning they had returned to the dwelling. Despite Mr Foulkes' objections his wife had sided with the children in agreeing that they could remain in the dwelling. Mr Foulkes called the Police. Having ascertained the background of what had recently happened Officers told Mr Foulkes to leave his own home of which he was a joint owner. There was no evidence that Mr Foulkes had committed any damage or had been aggressive nor that he was a violent man. The fact that Mrs Foulkes had expressed concern that if Mr Foulkes re-entered the dwelling there might be arguments did not mean that there would necessarily be violence or damage to property. Nor had the arresting officer enquired about the circumstances on the previous evening when Police had attended at the premises. On that occasion it was only the two children who had been required by Officers to leave.

52. Put simply there having been no breach of the peace on the part of Mr Foulkes there was no serious or imminent threat to the peace to justify his arrest. Reasonable grounds for his arrest were absent.

53. Thorpe LJ in his judgement referred to the protection afforded to Mr Foulkes under successive pieces of English legislation culminating in the Family Law Act 1996. He concluded that Mrs Foulkes' exclusion of her husband from the jointly owned matrimonial home was wrongful. It is noteworthy there is no equivalent legislation in Guernsey and Mr Barnes has not convinced me that the Appellant had any property rights other than a revocable licence to enter the dwelling. It was not even clear whether he had ever held a key to the property.

54. The facts of this case are substantially different from the facts of the Appellant's case.

Bibby v Chief Constable of Essex

55. The facts of this case heard in the English Court of Appeal, Civil Division, were also significantly different from the present case.

56. A bailiff had lawfully entered a debtors property. Although he was large and positive he was not threatening to commit any crime or interfere with any right which the debtor had to goods. It was the debtor who was acting unreasonably. Nevertheless the bailiff had been arrested for conduct likely to cause a breach of the peace by a Police Officer who had failed to consider where the threat was coming from. In fact the Court of Appeal were clear that the threat had emanated from the debtor. Schiemann LJ who had also sat in the Court of Appeal in the case of *Foulkes v Chief Constable of Merseyside Police* reviewed the common law power to arrest for conduct likely to cause a breach of the peace and cited with approval the judgements in *R v Howell* and *Foulkes v Chief Constable of Merseyside Police*.

R v Howell

57. In R v Howell, a case heard in the Court of Appeal Watkins LJ read the judgement of the Court.

58. At page 427 at E/F he summarised what constituted a breach of the peace:

“we are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, and affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a Constable, or anyone else, may arrest an offender without warrant.”

59. This summary of the criminal offence was adopted by the Court of Appeal, Civil Division in both Bibby v Chief Constable of Essex and in Foulkes v Chief Constable of Merseyside Police. I am satisfied that there is a breach of the peace whenever harm is actually done or is likely to be done to a person’s property or when such harm to property is feared. It is not confined to harm to the person or a fear of harm to the person.

Credibility of Witnesses

60. Clearly the Appellant’s evidence concerning his conduct was substantially at variance to that of Miss Bates particularly concerning her allegation that after being required to leave the property on his return he had head butted the door, thrown a bike at it and had been shouting, all this whilst drunk.

61. There were issues of credibility for the Assistant Magistrate to resolve. He had the opportunity to hear and see the witnesses. Plainly he preferred, as he was entitled to do, the evidence of Miss Bates and the Police Officers to that of the Appellant. There was ample evidence that although the Appellant may have been seeking access to his medication his purpose in returning to the property on the second occasion was also to gain admission and to remain there despite warnings given by Officers. The Assistant Magistrate was fully entitled to conclude that the Appellant did not have a lawful right to visit the property and demand admission to the dwelling once, on the first occasion, his licence to be there had been revoked by Miss Bates.

Test on Appeal and Conclusion

62. It was common ground in this appeal that the issue for me to determine was whether the Assistant Magistrate’s verdict should be set aside on the grounds that it was unreasonable or could not be supported having regard to the evidence.

63. This Court will not usually interfere with findings of fact made by a Judge sitting in the Magistrate’s Court unless there was no evidence to support his findings or if the findings were such that no reasonable Judge, giving himself proper direction and applying the proper considerations, could reach them.

64. The Assistant Magistrate had heard evidence that it was the Appellant who was in the wrong. It was the Appellant who had been warned to leave and not to return. Nevertheless the Appellant had done so. He had caused harm to her property in the presence of Miss Bates and would in all likelihood have caused further harm to her property in her presence, if the Officers had not returned to the property. It is clear that the Assistant Magistrate considered Miss Bates to be a good witness and believed her.

65. The Assistant Magistrate was able to conclude on the evidence that the arresting officer, PC Chart had been able to satisfy himself on reasonable grounds that a breach of the peace had

been committed and that a further breach was imminent particularly given the Appellant's previous violent actions, his drunken state, his expressed intentions and the potential volatility of his emotions.

66. The Assistant Magistrate economically stated the reasons for his decision at the end of a short hearing estimated by Mr Barnes to have lasted some two hours. I am satisfied that it was not necessary for him to go into any more detail than he did.

67. Put simply the Assistant Magistrate's decision was not obviously and palpably wrong.

68. Accordingly the Appellant's appeal must fail.

69. I dismiss the Appeal.