

**Judgment 40/2008 Stuart Allan – Royal Court (Criminal Appeal No 15
of 2008) – 2 December 2008**

**Criminal appeal from the Magistrate’s Court – assault – appeal from conviction –
circumstances in which application of handcuffs by a police officer may constitute an
assault – appeal dismissed – The Nine Principles of Policing**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 2nd day of December, 2008 before John Russell Finch, Esquire, Lieutenant Bailiff, sitting
alone.

No.17 of 2008

In the matter of THE LAW OFFICERS OF THE
CROWN against STUART ALLAN to pursue the appeal of which the said Allan gave notice
against his conviction in the Magistrate’s Court on the 5th day of September, 2008;

THE COURT, having on the 24th day of
November, 2008 heard Advocate C.A. Tee for the Appellant and Advocate L. Roffey for the
Crown thereon, and having reserved judgment, this day ISSUED JUDGMENT in the
attached terms and DISMISSED the Appeal.

S M SIMMONDS
Her Majesty’s Deputy Greffier

Approved Text
2 December 2008

In the Royal Court of Guernsey

Appeal against Conviction

Stuart James ALLAN

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondents)

Date of hearing: 24th November 2008

Date of Judgment handed down: 2nd December 2008

Before: John Russell Finch Esq., Judge of the Royal Court

Advocate for the Appellant: C A Tee
Advocate for the Respondents: L C Roffey

Cases referred to:

1. Collins v Willcock (1984) 79 Cr. App. R. 229
2. Kenlin v Gardiner [1967] 2 QB 510
3. McMillan v C.P.S. [2008] EWHC 1457 (Admin)
4. Wood v D.P.P. [2008] EWHC 1056 (Admin)

Introduction

1. This is an appeal before myself sitting alone from a decision of the Magistrate (P Robey, Esq.) on 5th September 2008, whereby he convicted the Appellant of common assault on Rosemarie Holt and imposed a fine of £250.00. The conviction followed a not guilty plea and the hearing of evidence for both sides. The appeal is based upon points of law only, and the Magistrate's findings of fact have not been attacked.
2. The incident took place around 7.30 pm on 1st March 2008. The Appellant (whom I will refer to hereafter conveniently as "D") was a Police Constable on uniform patrol duty, driving a marked Police van. For the purposes of this judgment, I think it sufficient to mention that he saw Mrs Holt (hereafter "P") driving her car and noted very minor traffic infringements - as the Magistrate put it (page 78 of transcript at G): "*if traffic infringements they were at this time*". D had in mind the possibility that P may have been over the limit. D "*perfectly properly*" followed P's car. To cut the preliminaries of the story short, D illuminated his blue flashing light, which was not initially seen by P, but when she did, P did not think it was anything to do with her and carried on driving. D had his suspicions confirmed and pulled in front of P,

causing her to stop. What followed next is the crux of the case, so I make no apology for quoting the Magistrate's findings of fact (pages 80 – 81):

“What happened then? Well, one might think from the detailed cross-examination of Mrs Holt and PC Allen that there is a considerable difference in their accounts as to what happened next. In fact, when one analyses those accounts there really isn't that much difference. How one views what happened depends on the position from which you are looking at things, that of Mrs Holt or that of PC Allen.

I have reached the following conclusions about what happened after the car had eventually stopped.

PC Allen approached the car and told Mrs. Holt to get out of the car. He certainly repeated that order at least once but whether these were separate occasions or at the same time is in dispute, I don't think it really matters which. What is clear is that he was, to put it mildly, abrupt in his demand. Mrs Holt thought he was aggressive and Mr. Allen very honestly in his evidence accepted that he may have so appeared, although that, he says, wasn't his intention, and I accept what he says.

PC Allen then told Mrs Holt to move to the pavement, again, he was abrupt, with no suggestion of the addition of the simple word “please” which may have made so much difference to what followed. He followed this by telling Mrs Holt to get into the van where, he says, and again, I have no reason to doubt him, he intended to administer the breath test procedure.

Mrs Holt during this time was protesting that she had done nothing wrong. PC Allen did not at this stage, he may have done later, but at this stage he didn't explain to Mrs Holt why he was taking this action. He felt that Mrs Holt was refusing to follow his orders, which she was, and talking over him, which she may well have been. So we are faced with an escalating situation. PC Allen becoming more frustrated because Mrs. Holt, to put it simply, wouldn't do what she was told to do. Mrs Holt becoming more distressed because she didn't know what was happening or why it was happening.

Eventually, Mrs Holt instead of going in to the van moved to the driver's side of her car. By this time, and I don't think it's an exaggeration to say this, she was verging on the hysterical because of her distress. She would not go into the van and at that stage PC Allen, in the state she was, took the decision to apply handcuffs to her. As PC Allen says, he found this a very difficult situation, with Mrs Holt not complying with his verbal instructions and I do not disagree with that general description.

The question that falls for me to decide is whether the action PC Allen in handcuffing Mrs Holt amounted to an assault”.

That too, is the question that falls for consideration in this appeal.

Legal Considerations

3. It is best to start with Collins v Wilcock (1984) 79 Cr. App. R. 229. In his judgment Robert Goff L J said (at page 234):

“The fundamental principle, plain and incontestable, is that every person’s body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery”.

4. After dealing with the various exceptions, including “*all physical contact which is generally acceptable in the ordinary conduct of daily life*”, Robert Goff L J continued:

“Of course a police officer may subject another to restraint when he lawfully exercises his power of arrest; and he has other statutory powers with which we are not concerned. But, putting such cases aside, police officers have for present purposes no greater rights than ordinary citizens. It follows that subject to such cases, physical contact by a police officer with another person may be unlawful as a battery, just as it might be if he was an ordinary member of the public”.

5. He then went on to say:

“But a police officer has his rights as a citizen, as well as his duties as a policeman. A police officer may wish to engage a man’s attention, for example if he wishes to question him. If he lays his hand on the man’s sleeve or taps his shoulder for that purpose, he commits no wrong. He may even do so more than once; for he is under a duty to prevent and investigate crime, and so his seeking further, in the exercise of that duty, to engage a man’s attention in order to speak to him may in the circumstances be regarded as acceptable (see DONNELLY v. JACKMAN (1969) 54 Cr. App. R. 229; [1970] 1 W.L.R. 562). But if, taking into account the nature of his duty, his use of physical contact in the face of non-co-operation persists beyond generally acceptable standards of conduct, his action will become unlawful; and if a police officer restrains a man, for example by gripping his arm or his shoulder, then his action will also be unlawful, unless he is lawfully exercising his power of arrest. A police officer has no power to require a man to answer him, though he has the advantage of authority, enhanced as it is by the uniform which the state provides and requires him to wear, in seeking a response to his enquiry. What is not permitted, however, is the unlawful use of force or the unlawful threat (actual or implicit) to use force; and, excepting the lawful exercise of his power of arrest, the lawfulness of a police officer’s conduct is judged by the same criteria as are applied to the conduct of any lawful citizen of this country”.

6. Reference was made to two more recent cases. In Wood v D.P.P. [2008] EWHC 1056 (Admin) Latham L J concluded (at para 7 of his judgment):

“.....where a police officer restrains a person, but does not at that time intend or purport to arrest him, then he is committing an assault, even if an arrest would have been justified”.

7. The older case of *Kenlin v Gardiner [1967] 2 Q.B. 510* was cited in support of that observation. In *McMillan v C.P.S. [2008] EWHC 1457 (Admin)*, an officer led a drunken woman from a garden, by taking her by the arm. This was an appeal by way of Case Stated and the facts found were that the officer wanted to speak to the woman in the street to sort out the problem without an arrest. He took hold of her arm to steady her, as she had been drinking and it was steep. This was done “*not against her will*”. Subsequently, the woman was drunk and swearing on the public road and was arrested. Reference was made to Robert Goff L.J.’s observations in *Collins v Willcock (supra)* and it was held that here the officer was acting in good faith and in conformity with “*generally acceptable standards of conduct*”.
8. It was somewhat tentatively submitted by Advocate Tee that Guernsey Courts are not bound by English cases and we should apply Guernsey principles. This, as a general proposition, is correct. One would not expect to follow English cases based on statutes that have no effect in Guernsey, or apply sentencing-guidelines peculiar to England and Wales. However, in criminal matters, it has for a long time been the practice of the Guernsey Courts to follow English principles and textbooks – if one looks at the Commissioners’ Report of 1848 there is respectful reference to Archbold (then in its 11th edition). In a case of this sort, where there is no practical difference between English and Guernsey law, a Guernsey Court would be very ill-advised not to regard an English decision with great respect. It is not technically binding, but one should be slow to depart from it, and it would normally be undesirable to do so. For my part I will follow the cases referred to and they provide, in my judgment, the correct legal backdrop to the present appeal.

Application of Law to the Facts Found

9. The Magistrate correctly observed (page 81-E):

“..... the application of handcuffs by PC Allen will constitute an assault unless he had a legal right to use them in all the circumstances”.

10. He went on to point out that self-defence was not an issue in this case. D did not request a breath test, nor did he exercise his power of arrest at any time. On the facts, I have to say that D might have been hard put to justify an arrest for a breach of the peace. But there was no arrest and, as the Magistrate went on to say correctly (page 82-G):

“So, quite simply to justify the – it’s self-evident, the assault on the grounds of an arrest, there does have to be an arrest and an intention to arrest. There was no such intention here”.

11. Reference was made at the trial and on appeal to the Guernsey Police training on the use of handcuffs. The Magistrate did not think that these helped him in any way (page 82–H), as P was not an existing prisoner of D’s when he applied them. In addition, these guidelines cannot provide a legal justification for D’s actions, although

they might be relevant to mitigation. For the sake of completeness, I would observe that there does not appear to be anything wrong with the guidelines, but on the facts, D had problems justifying the use of handcuffs even if he had arrested P. It was also suggested that there may be some circumstances where even without arrest and/or detention, the use of handcuffs might be lawful. The Magistrate (page 83-C) could not think of any. PC Williams, the control and restraint trainer, appeared to consider that this was so (page 39-B). The example he gives of a search for drugs is not apposite, because a person who physically resisted or obstructed an officer carrying out such a lawful search would be liable to arrest, and then almost inevitable handcuffing.

12. I will deal with Grounds 1.4 and 1.5 of the appeal shortly. The reference to a “*defence of another*” is inapplicable. There was no specific or pressing threat to P; the defence is, in any event, generally understood to permit A to act against C, who is posing a threat to B. Nor is there any substance in the submission that the Magistrate wrongly decided D did not have the right to apply the handcuffs to P, on the facts found. The *McMillan v C.P.S.* case (*supra*) is simply an application of established principles, as crystallized in *Collins v Wilcock (supra)*, to the individual circumstances. I have considered all the other points raised by Advocate Tee and find, respectfully, that they lack merit.

13. The case is in reality a simple one, involving the application of familiar legal principles to the individual circumstances found. There is nothing to show that *Collins v Willcock* or *Wood v D.P.P.* were wrongly-decided; indeed Robert Goff L.J., later Lord Goff, was one of the greatest legal brains of the latter part of the 20th century, and remains justly celebrated to this day. These cases set out the parameters and D signally failed to observe them. The Respondents’ Skeleton Argument, at para 11, is correct when it states:

“The situation faced by the Appellant was a straight forward one. In the circumstances he was faced with, he had valid grounds for stopping Mrs Holt and requiring her to provide a specimen of breath. If she failed to do so then she would have committed an offence and he would have been entitled to arrest Mrs Holt and if necessary (my emphasis), place handcuffs on her. That situation did not arise as the Appellant did not arrest Mrs Holt and therefore no authority to utilise handcuffs arose from such a course of action. The Appellant has not established any other legal basis for his use of handcuffs”.

14. Accordingly the learned Magistrate’s careful and detailed judgment was right on the law and, indeed, there was no alternative to recording a conviction in these circumstances. A good deal of what was urged on D’s behalf was given effect to by the moderate sentence imposed. Advocate Tee’s industrious submissions on the law fail, as does this appeal.

Envoi

15. I append the “*Nine Principles of Policing*” composed by Rowan and Mayne, the first Commissioners of the Metropolitan Police, issued to every recruit, and first published in 1829. They remain of enduring value to this day and their observance will prevent further undesirable cases of this nature coming before the Courts:

The Nine Principles of Policing

1. To prevent crime and disorder, as an alternative to their repression by military force and severity of legal punishment.
2. To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour and on their ability to secure and maintain public respect.
3. To recognise always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of laws.
4. To recognise always that the extent to which the co-operation of the public can be secured diminishes proportionately the necessity of the use of physical force and compulsion for achieving police objectives.
5. To seek and preserve public favour, not by pandering to public opinion; but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws, by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour; and by ready offering of individual sacrifice in protecting and preserving life.
6. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.
7. To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police, the police being only members of the public who are paid to give full time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.
8. To recognise always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary of avenging individuals or the State, and of authoritatively judging guilt and punishing the guilty.
9. To recognise always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them.

16. APPEAL DISMISSED.

J R Finch
Judge of the Royal Court, 2nd December 2008