**[2019] JMCA Crim 32**

**JAMAICA**

**IN THE COURT OF APPEAL**

**PARISH COURT CRIMINAL APPEAL NO 9/2017**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MR JUSTICE BROOKS JA**

**CRAIG WHITE v R**

**Debayo Adedipe for the appellant**

**Miss Keisha Price and Joel Brown for the Crown**

**7, 8, 23 March 2018 and 4 October 2019**

**PHILLIPS JA**

[1] The appellant was charged with assault with intent to rob and assault at common law, but he was only indicted for assault with intent to rob. He was tried and convicted for assault with intent to rob by Her Honour Mrs Desiree Alleyne in the Manchester Parish Court, and was sentenced to three months' imprisonment at hard labour suspended for three years with supervision. Despite not being indicted for or convicted of assault at common law, he was nonetheless fined $30,000.00 or three months' imprisonment at hard labour for that offence.

[2] He sought to challenge his conviction and the sentences imposed on the basis that the learned Parish Court Judge had erred in: (i) finding that the appellant was part of a common design to rob the complainant; (ii) imposing a manifestly excessive

sentence for assault with intent to rob; and (iii) imposing a sentence for assault at common law despite the fact that the appellant had not been indicted for the same.

[3] After hearing submissions in the matter, we made the following orders on 23 March 2018:

> "1. Appeal against conviction is dismissed.
>
> 2. Appeal against sentence is allowed.
>
> (i) The sentence of three months imprisonment suspended for three years with supervision in relation to the offence of assault with intent to rob is varied to remove the suspension of the sentence for three years with supervision. Taking into account the 15 months spent in custody awaiting trial, the appellant is deemed to have served his sentence.
>
> (ii) The sentence in relation to assault at common law is set aside as being a nullity.
>
> (iii) The court orders that the amount of $30,000.00 paid by the appellant be refunded to him forthwith."

[4] We promised to put our reasons into writing, and this judgment is a fulfilment of that promise.

**Background**

[5] As indicated, the appellant was charged for assault with intent to rob and assault at common law, but had only been indicted for assault with intent to rob. He was charged jointly with Mr Javone Myrie (the co-accused). Evidence in support of the offence of assault with intent to rob was given by Detective Corporal Clayton Brown. He

testified that on 6 September 2011, between 6:00 pm and 8:00 pm, he changed his appearance to resemble that of a female in women's clothing (which consisted of a jacket, blouse, skirt, wig, handbag and shoes), and make-up. He did so in an effort to lure rapists that were terrorising women in Mandeville in the parish of Manchester at the time. He went to Wint Road in Mandeville accompanied by Constable Sevaskar Grant, who was also in disguise, dressed as a male in regular civilian plain clothes.

[6] Whilst walking along Wint Road, Detective Corporal Brown indicated that he saw men walking on the "Gulf Common". One of the men came out of the bushes and walked passed him and Constable Grant going in the opposite direction. Two men then came out of the bushes ahead of him, and started to walk in front him slowing their steps as they walked. The men went up to a streetlight, stopped, turned around and then walked towards himself and Constable Grant. Both men came within touching distance, and he saw objects in their hands. He knew them before by name and was able to properly identify them.

[7] One of the men (the co-accused), said "[a]ye mommy whe you ah look like you pree we suh. Give me the money", and held onto Detective Corporal Brown's hand. Detective Corporal Brown testified that when the co-accused said those words to him he "felt afraid" and felt that he would be robbed or raped. The other man, who was the appellant, then said to Constable Grant "[a]ye bwoy wha you deh pon". Constable Grant then produced a firearm and said "[p]olice don't move". The appellant dropped an object to the ground. The co-accused then let go of Detective Corporal Brown's hand and stepped back. Detective Corporal Brown held onto him and a struggle ensued.

Constable Grant then came to assist, and also called other police officers for assistance. The appellant was later restrained, and the object he threw away was retrieved and found to be a black handled knife about six inches long and one inch wide.

[8] A report was made to Detective Corporal Peter Myles who was the investigating and arresting officer. Detective Corporal Myles testified that he received information and went to the scene of the incident shortly after it had occurred. He saw the appellant and his co-accused in the company of Detective Corporal Brown and Constable Grant. After being cautioned by Detective Corporal Myles, the appellant said, in the presence of the co-accused, that "he was on his way to Upper Level bar when he lost his way", and the co-accused said, in the appellant's presence, "me ah tell you the truth, me nuh know whe mek me do it". Detective Corporal Myles charged both men with assault with intent to rob, and charged the appellant with assault at common law.

[9] At the trial, Detective Corporal Myles testified that Constable Grant had resigned voluntarily from the Jamaica Constabulary Force and had migrated overseas.

[10] A no case submission was made that was rejected by the learned Parish Court Judge. However, when called upon to answer the charge brought against him, the appellant chose to remain silent.

[11] In her reasons for judgment, the learned Parish Court Judge reviewed the evidence for the Crown and suggestions made to the Crown witnesses by the defence. She rejected suggestions made by the defence that Detective Corporal Brown had framed the appellant, as: (i) no evidence had been led that he knew that the appellant

would have been on Wint Road at the time of the incident; (ii) there was no suggestion that the police officers had arranged to meet the appellant and his co-accused that night; and (iii) Detective Corporal Brown would not have been recognised as he was dressed as a female.

[12] The learned judge had also rejected the argument that, since Detective Corporal Brown was a police officer, was the head of street crime in Manchester and did not draw his firearm at all during the incident, he was not fearful. She found that, having observed Detective Corporal Brown's demeanour, he was being truthful when he said he was afraid. She also noted that police officers had to perform their duties as police officers despite being fearful.

[13] The learned judge found that the appellant and his co-accused were acting in concert that night. In support of that finding she stated the following:

> "They came out of the bushes together, slowed their steps together, kept walking and looking back in the officers' direction, stopped at the streetlight and turned and walked up to the officers together. The Court also finds that they had objects in their hands that night and that Javone Myrie did touch Detective Corporal Brown saying 'wha you ah pree me fuh', and 'give me the money'. The court also finds that Craig White Shouted 'Aye bwoy wha you ah deh pon'."

[14] Having considered all the factors, the learned judge found beyond a reasonable doubt that the appellant assaulted Detective Corporal Brown with intent to rob him. She sentenced him as stated at paragraph [1] above, indicating that the appellant was

given suspended sentences because, for various reasons, he had spent over one year in custody before being bailed.

**Issues on appeal**

[15] The appellant sought to appeal his convictions and sentences on the basis stated at paragraph [2] above. Based on the grounds of appeal filed and the submissions advanced in the instant case, the appeal raised three main issues:

(i) Did the learned judge err in finding that the appellant was part of a common design to assault and rob Detective Corporal Brown? (grounds (i)-(v))

(ii) Was the sentence imposed for assault with intent to rob manifestly excessive? (ground (vi))

(iii) Was the sentence imposed for assault a nullity having regard to the fact that the appellant had neither been indicted nor convicted of that offence? (ground (vii))

**Did the learned judge err in finding that the appellant was part of a common design to assault and rob Detective Corporal Brown? (grounds (i)-(v))**

[16] Counsel for the appellant, Mr Debayo Adedipe, submitted that the appellant was not a principal in the first degree because the appellant had not done any act that would constitute participation in the offence. He stated that the appellant's physical presence at the scene and the words uttered by him were not sufficient to establish joint enterprise. He also stated that since Detective Corporal Brown was ambivalent as to what his fear was, the requisite *mens rea* for assault was not established.

[17] Mr Joel Brown, for the Crown, submitted that the learned judge correctly found that the appellant was a part of the common design. He argued that the evidence elicited supported the inference drawn by the learned judge that both the appellant and the co-accused were acting in concert, since it is clear from the evidence that they were together, acting together and their actions were deliberate.

[18] The law in relation to common design was restated in the judgment of Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council in **R v Jogee; Ruddock v The Queen** [2016] UKSC 8; [2016] UKPC 7. The judgment has been cited with approval in many cases decided by this court, including **Joel Brown and Lance Mathias v R** [2018] JMCA Crim 25, where at paragraph [77] McDonald-Bishop JA said:

> "...The core of the principle [of joint enterprise/common design], as restated in **R v Jogee; Ruddock v The Queen**, is that a person who assists or encourages another to commit a crime (the secondary party or the accessory) is guilty of the same offence as the actual perpetrator of the crime (the principal) if he 'shares the physical act', that is, through assisting and encouraging the physical act. In their Lordships words, '[h]e shares the culpability precisely because he encouraged or assisted the offence'. Their Lordships further explained:
>
> > 'Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other.'"

[19] At paragraph [92] she also stated that:

> "...[W]hat is required to ground liability on the part of D2 for crime B, which was committed by D1, is an intention to participate in the commission of crime B or the intention to assist and encourage D1 in the commission of crime B, with knowledge of all the facts constituting the commission of the crime."

[20] In the light of those principles and upon review of the evidence in this case, it was indeed clear that the appellant was in fact a participant in the commission of the crime. As the learned judge found, both the appellant and the co-accused were together at all times, they approached Detective Corporal Brown and Constable Grant together. The appellant had an object in his hand which caused Detective Corporal Brown to be put in fear. The appellant also assisted and encouraged the commission of the offence because when the co-accused said to Detective Corporal Brown 'Aye mommy whe you ah look like you pree we suh. Give me the money", the appellant shouted to Constable Grant saying "Aye bwoy wha you ah deh pon" with an object in his hand. Detective Corporal Brown testified that these actions placed him in fear of being robbed and raped (presumably, as he was dressed as a female). In our view, the fact of his being a police officer does not diminish or make incredible his claim that he was placed in fear. Accordingly, grounds (i)-(iv) of the grounds of appeal failed, and as a result, the appeal against conviction failed.

**Was the sentence imposed for assault with intent to rob manifestly excessive? (ground (vi))**

[21] Mr Adedipe contended that the sentence imposed on the appellant for assault with intent to rob of three months' imprisonment at hard labour suspended for three

years was manifestly excessive, having regard to the fact that the appellant had spent 15 months in custody before being offered bail, his antecedents were good, and also because of the minimal role he had played in the commission of the offence. Mr Brown submitted that the learned Parish Court Judge had complied with all the accepted principles of sentencing in that the sentence she had imposed fell within the range of sentences; and she had considered the fact that the appellant had spent time in custody before being offered bail.

[22] This court in **Meisha Clement v R** [2016] JMCA Crim 26 has given helpful guidance to courts on the factors to be considered and principles to be applied when considering the sentence that ought to be imposed. With those principles in mind, we could not say that the learned Parish Court Judge had considered all the relevant factors in sentencing the appellant. While she acknowledged the fact that he had been in custody for over one year, she gave no consideration to his lack of previous relevant convictions, or his antecedents as outlined in the social enquiry report, nor did she explain why a suspended sentence with supervision for three years was warranted in all the circumstances. It was for those reasons, and the fact that the appellant had already spent 15 months in custody, that we set aside the sentence imposed for assault with intent to rob, and imposed a sentence of time served.

**Was the sentence imposed for assault at common law a nullity? (ground vii))**

[23] Mr Brown readily conceded that there was merit in ground (vii) as there was indeed an anomaly with regard to the indictment, which spoke to only one count for assault with intent to rob. However, the appellant was sentenced for both assault with

intent to rob and assault at common law and Mr Brown, in our view, correctly indicated that the learned Parish Court Judge had no jurisdiction to sentence the appellant for assault at common law as the indictment order on the information only referred to the offence of assault with intent to rob. Another factor that gave credence to the view that the sentence imposed for assault at common law was irregular was the fact that the learned Parish Court Judge, in her written reasons for judgment, only addressed a conviction and sentence for assault with intent to rob. In all the circumstances, the sentence imposed for assault at common law was found to be a nullity. We therefore set aside that sentence, and ordered that the fine paid by the appellant in the sum of $30,000.00 should be returned to him forthwith.

[24] These therefore are the reasons for the decision we delivered and sentence we imposed on 23 March 2018 which are set out in paragraph [3] herein. The delay in the production of the same is regretted.