

NMLS

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 2 & 5/97**

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.**  
**THE HON. MR. JUSTICE BINGHAM, J.A.**  
**THE HON. MR. JUSTICE WALKER, J.A. (AG.)**

**R. V. RAJENDRA THOMPSON**  
**BYRON ANDERSON**  
**DEVON RUSSELL**  
**THOMAS LUE**  
**MICHAEL REECE**  
**LENNOX DAVIDSON**  
**WILBERT McCALLA**  
**LEROY GORDON**  
**DONALD LIVERMORE**

**Errol Gentles for Thompson**

**Glen Cruickshank & Delroy Chuck for Anderson**

**Bert Samuels for Russell**

**Frank Phipps, Q.C. & Robin Smith for Lue**

**Wentworth Charles for Reece & Davidson**

**Anthony Pearson for Gordon**

**Ian Wilkinson for McCalla**

**Donald Livermore appeared in person**

**Hugh Wildman, Deputy Director of Public Prosecutions & Sandra Kerr  
for Crown**

**April 10, 11, 16, 17, 18, 21, 22, & 25, 1997**

## JUDGMENT OF THE COURT

**DOWNER, J.A.**

After a hearing which lasted 7 days in this complex case, we took time to consider our decision and promised to deliver judgment today. Thereafter we will put our reasons in writing.

The principal averments were three charges of conspiracy to steal large quantities of sugar in the possession of the Sugar Industry Authority at their warehouse at Marcus Garvey Drive.

It is appropriate to consider the case of Leroy Gordon in the first instance. He was found guilty on count four of the indictment with respect to one of the incidents on May 20th, 1994 when sugar was delivered to Sam's Enterprise at Beeston Street. Mr. Pearson appeared for him on the first day. Gordon did not turn up on that day or any other day. Neither did his surety. The bail bond was estreated and writ of capias and distringas ordered. He is deemed to have abandoned his appeal, so his appeal was dismissed, his conviction and sentence of 9 months at hard labour affirmed.

It is now appropriate to address those charges on the first count which involved sugar unloaded at the warehouse of Thomas Lue on 20th May, 1994. The following were found guilty and sentenced to nine months imprisonment at hard labour. They are Donald Livermore, Wilbert McCalla, Michael Reece, Lennox Davidson and Thomas Lue. Her Honour Miss Gloria Smith did not demonstrate either expressly or inferentially in her findings of fact that she recognized that the identity of Russell was a live issue. Consequently, that evidence required the most careful assessment. Because of that failure, the convictions imposed on Russell must be quashed and the sentences set

aside. A judgment of acquittal must be entered in his favour. With respect to the others the orders of Her Honour must be affirmed.

Turning to count four of the indictment, apart from Gordon the following were found guilty of conspiracy to steal sugar which was unloaded at Sam's Enterprise at Beeston Street. Devon Russell, Wilbert McCalla, Michael Reece, Lennox Davidson, Rajendra Thompson and Byron Anderson. At the close of the Crown's case, there was no admissible evidence against Anderson that he was the owner of Sam's Enterprises, although in his unsworn statement he stated that he was. In accordance with principle and binding authority, he should not have been called on to answer a case in the court below. Therefore, the judgment of guilty must be quashed and the sentence of 9 months hard labour set aside. A judgment acquittal must be entered in his favour. The convictions and sentences of the others must be affirmed except for Russell. The reasons adumbrated in count one apply with equal force to this count also.

Regarding count seven for which the following five Donald Livermore, Devon Russell Wilbert McCalla, Lennox Davidson and Michael Reece were found guilty of conspiracy to steal sugar which was on exhibit in the court below. The conviction against Russell cannot stand for the reason adverted to in counts one and four. The convictions and sentences against all the others must be affirmed.

The evidence of overt acts against the appellants came from an undercover agent employed to Security Advisory Management Consultants. He was placed in the strategic position of scale clerk which controlled the movements of vehicles near the entry and exit points of the warehouse. He was assisted by electronic devices which enabled him to keep in touch with others who were keeping watch, unknown to the miscreants from within and their confederates without. There was sustained criticism of Her Honour that she failed to warn herself of the dangers of relying on the

uncorroborated evidence of an accomplice. However, we hold that the following passage in the summing up of Maule, J to the jury in *R v Mullins* Vol. 111 (1848-1850) Cox Criminal Law Cases 526 at 531 settled the law on this issue. It runs thus:

"... A spy, on the other hand, may be an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counter-acting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices, and although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration.

This principle has been applied in this jurisdiction to undercover agents of the police, and those from the United States Drug Enforcement Agency. It must apply with equal force to undercover agents of security firms especially since statute law has now recognised their existence in the Private Security Regulation Authority Act. We will accord their secret agents the same reception that is accorded to those of the constabulary force and those of a friendly foreign power. It is in the interests of justice that this be so.

It was the direct and circumstantial evidence adduced before the Resident Magistrate which has enabled us to affirm her judgments of guilty. However, the judgments in respect of Russell and Anderson must be set aside and judgments of acquittal entered.