

NMLS

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEALS NOS. 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. (A.G.)

REGINA
vs.
RAJENDRA THOMPSON
BYRON ANDERSON
DEVON RUSSELL
THOMAS LUE
MICHAEL REECE
LENNOX DAVIDSON
WILBERT McCALLA
LEROY GORDON
DONALD LIVERMORE

Errol Gentles for Thompson
Glen Cruickshank and Delroy Chuck for Anderson
Bert Samuels for Russell
Frank Phipps Q.C. & Robin Smith for Lue
Wentworth Charles for Reece and Davidson
Anthony Pearson for Gordon
Ian Wilkinson for McCalla
Donald Livermore appeared in person
Hugh Wildman, Deputy Director of Public Prosecutions
and Sandra Kerr for the Crown

April 10, 11, 16-18, 21, 22, 25 and December 8, 1997

DOWNER, J.A.

Before Her Honour Miss Gloria Smith in the Resident Magistrate's Court at Half-Way Tree, the nine appellants before this court were convicted of charges of conspiracy to steal sugar from the Sugar Industry Authority warehouse. Some of

the appellants were also charged with substantive offences of larceny and in the alternative receiving sugar knowing it to be stolen contrary to the Larceny Act. No verdicts were returned on those counts. The sugar was warehoused at Marcus Garvey Avenue and the findings in the court below were that by a cunning scheme it was illegally removed, although in some instances, the sugar did eventually reach its correct destination because of the intervention of the police.

In a case of this complexity perhaps the most appropriate analysis is to take each conspiracy count on which a verdict was returned and delineate the relevant evidence against each appellant, then it would be ascertained why each appellant was obliged in law to answer the case made out against him. As there was a fraudulent departure from the system, the regular course will be described so as to demonstrate that those employed to safeguard the system, subverted it.

Afterwards the law on conspiracy ought to be analysed in relation to the facts found. Thereafter there would be an examination of the defence and the findings of the Resident Magistrate in respect of each appellant. Then it will be determined whether the convictions recorded can be affirmed or the appeals ought to be allowed.

The first conspiracy count

Donald Livermore, Devon Russell, Elkanah McLeish, Wilbert McCalla, Michael Reece, Lennox Davidson, Thomas Lue, and Andrew Chin.

Statement of Offence- First Count

Conspiracy to steal

Particulars of offence -First Count

Donald Livermore, Devon Russell, Elkanah McLeish, Wilbert McCalla, Michael Reece, Lennox Davidson, Thomas Lue and Andrew Chin on diverse days

including the 20th day of May 1994, in the parishes of Kingston and Saint Andrew, conspired together with other persons, to steal a quantity of sugar the property of the Sugar Industry Authority

The substantive offences relating to this inchoate offence were averred in counts 2 & 3. Here they are:

Statement of Offence - Second Count

Simple Larceny

Particulars of Offence - Second Count

Donald Livermore on the 20th day of May 1994 in the parish of Kingston stole a quantity of sugar the property of the Sugar Industry Authority.

Then the Third count reads:

Statement of Offence - Third Count

Receiving Stolen Property contrary to Section 46 (1) of the Larceny Act.

Particulars of Offence - Third Count

Thomas Lue and Andrew Chin on the 20th day of May 1994 in the Parish of Saint Andrew, received a quantity of sugar the property of the Sugar Industry Authority, knowing the same to have been stolen or otherwise unlawfully obtained.

. As for the third conspiracy count, no substantive offence was charged.

The charges were admirably summarised on the back of the indictment thus:

FOR:

1. Conspiracy to steal (Counts 1, 4 & 7)
2. Simple Larceny (Counts 2 & 5)
3. Receiving stolen Property (Counts 3 & 6)

The conspiracy counts are of especial importance in this case for it was on these counts that verdicts of guilty were returned.

There were critical comments on the manner in which the indictment was drawn. It was contended by counsel for the defence that if there was conspiracy there was one conspiracy not three conspiracies. The pleader's method however can be justified. The substantive offences relating to Count 1 were related to truck No. 2695 driven by Livermore and the substantive charges of Larceny or Receiving cover the sugar delivered to Lue's wholesale by Livermore.

The conspiracy charged in Count four relates to truck No. 2627 and covers the sugar delivered to Anderson's place of business. The substantive offences involved Thompson the driver of truck No. 2627. So considered there were interlocking conspiracies and the substantive offences defined their scope. As regards the third conspiracy charge in Count seven there were no substantive offences charged. It is related to truck 2695 and the driver was Livermore.

Another point to note was that at the close of the prosecution's case no further evidence was offered by the Crown against Elkanah McLeish in respect of the first and seventh counts and Andrew Chin in respect of the first conspiracy count. Further the same procedure was also followed as regards Andrew Chin on the receiving charge in the third count for receiving.

There was a general criticism by counsel for the defence because counsel for the Crown included substantive offences in the indictment in addition to the inchoate offences of conspiracy. There was no merit in the criticism for the conspiracy charges catered for the criminality of those who agreed to steal sugar. The substantive charges concerned those who stole or received stolen sugar knowing it to be stolen.

The statement of principle applicable is to be found in Verrier v D.P.P.

(1967) 2 A.C. 223-224 Or. [1966] 3 All. E.R. 568 at 575. Lord Pearson said:

" I think it is desirable to add some words of caution:

(1) Normally it is not right to pass a higher sentence for conspiracy than could be passed for the substantive offence: it can be justified only in very exceptional cases.

(2) Although it must follow logically from what is said above that it could in a very exceptional case be right to charge conspiracy even when the substantive offence had been committed and was charged, it should undoubtedly remain the general rule that, when there is an effective and sufficient charge of a substantive offence, the addition of a charge for conspiracy is undesirable because it will tend to prolong and complicate the trial."

For an instance where substantive charges were properly joined to a conspiracy charge see Doot v D.P.P. (1973) 1 All E.R. 940 at 953. In the instant case while the conspiracy charges embraced the criminality of all the participants who agreed to execute the criminal enterprise, the substantive charges of larceny and the alternative of receiving were only applicable to some of the participants. On this basis the charges for both the inchoate and substantive offences were appropriate. In this case guilty verdicts ought to have been returned on the substantive offences with respect to Livermore, Lue and Thompson. It was open to this court to return those verdicts. However, we have declined to do so since in only one instance there was an appeal against sentence and we were not minded to interfere with any of the sentences.

The other preliminary points to note was that the appellants were on bail, except for Lue. He was in prison for other offences. Mr. Anthony Pearson for

Gordon attended this court on 10th and 11th April, Gordon never attended so on 18th April his bail bond was estreated and a writ of distringas and capias was ordered. Sec. 297 of the Judicature (Resident Magistrates) Act states the provisions for liberation of the accused under recognizance pending appeal. It reads:

" When the notice of Appeal has been duly lodged, it shall be lawful for the Magistrate, or in his absence the Clerk of the Courts, to liberate the accused, if in custody, upon his entering into recognizance with such surety or sureties as the Magistrate, or in his absence the Clerk of the Courts, may think advisable, and in such sum as the Magistrate may fix, to attend the Court of Appeal personally or by counsel on the hearing of the appeal, and (in the event of the Court of Appeal dismissing the appeal) to surrender himself forthwith into custody to undergo the term of imprisonment adjudged, and in the meantime, not to leave the Island."

Then if the appellant enters into recognizance the provisions are as follows:

" On such accused person entering into such recognizance as aforesaid, it shall be lawful for the Magistrate, or in his absence the Clerk of the Courts, to order the jailer or other person having the custody of the accused, to liberate such accused person, and such accused person shall be liberated accordingly."

Further provision is made for the appellant's arrest if the appellant attempts to leave the Island thus:

" Provided always, that it shall be lawful for any constable at any time without any warrant to arrest such accused person, should he attempt to leave, or make any preparations for leaving the Island, and such accused person so arrested shall be detained in any prison appointed for the purpose by the Minister until the hearing of his appeal, his attendance at which shall be secured by the Commissioner of Police if the accused is detained in any jail or lockup, or by the Director of Prisons if the accused is detained in the General Penitentiary or in the St. Catherine District Prison."

Then the consequence of not attending the hearing of the appeal is stated thus:

" Provided always, that if an appellant fails to attend personally or by counsel at the hearing of his appeal, the appeal shall be dismissed, unless the Court is satisfied that his non-appearance is not due to willful default."

It is against the background of Mr. Pearson's failure to give any explanation for Gordon's absence that this court without considering the merits dismissed his appeal and affirmed the conviction and sentence.

The status of evidence provided by informers

employed to Security Companies

Before concentrating on the evidence marshalled by the Crown it is necessary to advert to the circumstances in which this case was investigated, the caliber of the investigators and the nature of their remuneration. To detect some crimes planning akin to that resorted to by military strategists is required. Moreover, the volume of criminal activity is now so large that the Constabulary Force if unaided is unable to cope. As a result security firms with skilled personnel are retained. They operate in cooperation with the security forces. Parliament has recognised this development and enacted The Private Security Regulation Authority Act which regulates this private police force. It is a recognition that the state cannot provide all the law enforcement for the protection of private property. Moreover, without the provision for adequate security, insurance companies might not provide coverage against theft generally, nor will they provide fidelity insurance for the misdeeds of the employees of the insured. It is against this background that the evidence of employees of Security Advisory Management Service Ltd.

must be assessed. A feature which emerges in this case is the need for close cooperation between the private and public police force especially in the vital areas as the taking of caution statements before arrests are made.

In this context the evidence of Lt. Commander Frank David Hall is relevant.

He states:

" Security Consultant attached to Security Advisory and Management Services Limited otherwise called "SAM'S". I am currently the Managing Director. We conduct all sorts of investigations except matrimonial matters. In addition we provide Contract Security Managers, Security Auditors and Security Inspectors.

From time to time I participate in investigations carried out by my firm. I have been involved in investigations in a military capacity for 12 years and in a Civil capacity for approximately 7 years. I have had training in investigations. As a result of my posting to Jamaica Defence Force's Military Police I was trained overseas with the Royal Military Police School of Service Intelligence. I have attended numerous investigative courses overseas in United States of America in counter, in emergency, counter intelligence and narcotics matters."

As to how his company was retained, he said:

" In August 1993 my firm was approached by Mr. R. Carl James. He is the Managing Director of Jamaica Cane Products Sales Limited. He wished to utilize our services for the purpose of investigating the loss of sugar at the Marcus Garvey Warehouse. My firm accepted this assignment."

At this stage it is important to refer to Joseph Williamson who played a critical role in the investigations. Moreover, Mr. Wilkinson for McCalla and Mr. Charles for Reece and Davidson were critical of Her Honour for not demonstrating that she was obliged to receive the evidence with caution. The contention was that

his evidence was akin to that of an accomplice and required the appropriate warning.

In the judgment of the court delivered on 25th April, 1997 this court ruled as follows:

" 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."

Mr. Phipps, Q.C. submitted that the principle embodied in this passage ought to be revisited as it was outmoded. The authorities suggest otherwise. In **R v. Dowling** Cox's Criminal Law Cases Vol. 111 (1848-50) 509 at 516 Erle J as he then was in summing up to the jury said:

" If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness, and his testimony did not require confirmation as that of an accomplice would do: he was not an accomplice, for he did not enter the conspiracy with the mind of a co-conspirator, but with the intention of betraying it to the police, with whom he was in

communication. At the same time, from the facts of his joining the confederacy for the purpose of betrayal, and that he had used considerable deceit by his own account in carrying out that intent, the jury would do well to receive his evidence with caution, seeing that it was probable on the face of it, and borne out as far as it could be by the other circumstances of the case."

The Court of Criminal Appeal expressly approved of Mullins in R. v. Henry

Bickley 2 Cr. App. Rep. 53 at 54. In Brannan v Peek (1948) 1 K.B. 68 at 72 Lord

Goddard had this to say:

" If the police authorities have reason to believe that offences are being committed in public houses, it is right that they should cause watch to be kept by detective officers, but it is not right that they should instruct, allow or permit a detective officer or constable in plain clothes to commit an offence so that they can say that another person in that house committed an offence. If, as the police authority assumed, a bookmaker commits an offence by taking a bet in a public house, it is just as much an offence for a police constable to make a bet with him in a public house, and it is quite wrong that the police officer should be instructed to commit this offence. I hope the day is far distant when it will become common practice in this country for police officers, who are sent into premises for the purpose of detecting crime, to be told to commit an offence themselves for the purpose of getting evidence against another person. In this case it seems to me the more reprehensible because, as the justices find in terms, on the second occasion at any rate the appellant was reluctant to bet with the police constable."

Humphrey, J. added at p.73:

" I entirely agree that it is not proper for a police constable himself to commit an offence. I think the most serious aspect of this case is that not only did the police constable commit an offence, but, as is made clear in the case, he encouraged and persuaded another person to commit an offence. It is not a case of his seeing that offences were being committed and reporting them; that is his duty. But he

went out of his way to invite and persuade the appellant to commit an offence and, as the case states, at least on the second occasion persuaded him to do so reluctantly."

These statements were favoured by Mr. Phipps, but R. v. Sang (1979) 3 All E.R. 1222 is the classic case on evidence by informers and if such evidence required corroboration or ought to be discouraged one would expect to find some mention of it there. A notable modern statement on this issue comes from Roskill, L.J. in Edward McCann (1972) 56 Cr. App. R. 359. Referring to Birtles [1969] 53 Cr. App. R 469; (1969) 1 W.L.R. 1647 the learned judge quoted Lord Parker, C.J. as saying:

" In such a case the police are clearly entitled, indeed it is their duty, to mitigate the consequences of the proposed offence, for example, to protect the proposed victim, and to that end it may be perfectly proper for them to encourage the informer to take part in the offence or indeed for a police officer himself to do so. But it is quite another thing, and something of which this court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character, which he would not otherwise commit, still more so if the police themselves take part in carrying it out."

In his own statement of principle Roskill, L.J. said:

" It is the duty of the police to take all proper steps to detect crime and to prevent crime happening. It is very difficult to lay down exact criteria which must always be adhered to whatever the facts of a particular case. A particular course of conduct may seem perfectly right and appropriate at the time when it is first discussed, perhaps in the heat of the moment, perhaps under pressure of events, and yet look wrong when many months later it is subjected to microscopic analysis in the cold atmosphere of an appellate tribunal working upon a transcript. This Court, whilst ever keen to ensure that the liberties of individuals are not adversely affected, should be very slow to criticise those who have to take difficult

decisions under pressure of events, when those decisions are taken in complete good faith."

There is a statement by Lord Parker in Sheridan (1974) 60 Cr. App. R. 59

at 61 which is particularly appropriate to the circumstances of this case.

" So far as the propriety of using methods of this kind is concerned, we think it right to say that in these days of terrorism the police must be entitled to use the effective weapon of infiltration. In other words, it must be accepted today, indeed if the opposite was ever considered, that this is a perfectly lawful police weapon in appropriate cases, and common sense indicated that if a police officer or anybody else infiltrates a suspect society, he has to show a certain amount of enthusiasm for what the society is doing if he is to maintain his cover for more than five minutes. Accordingly one must expect, if this approach is made by the police, that the intruder who penetrated the suspect organisation does show a certain amount of interest and enthusiasm for the proposals of the organisation even though they are unlawful. But, of course, the intruder, the person who finds himself placed in the organisation, must endeavour to tread the somewhat difficult line between showing the necessary enthusiasm to keep his cover and actually becoming an agent provocateur, meaning thereby someone who actually causes offences to be committed which otherwise would not be committed at all."

Then in Regina v Christou Wright (1992) 1 Q.B. 979 at 989 Lord Taylor,

C.J. said:

" There are, in criminal investigations, a number of situations in which the police adopt ruses or tricks in the public interest to obtain evidence. For example, to trap a blackmailer, the victim may be used as an agent of the police to arrange an appointment and false or marked money may be laid as bait to catch the offender. A trick, certainly; in a sense too, a trick which results in a form of self-incrimination; but not one which could reasonably be thought to involve unfairness."

The result of examining these authorities was that we found Her Honour was correct in accepting the evidence of Joseph Williamson the undercover agent. This was a case where craft and cunning had to be met with superior skills in those very areas. If such investigations were not permitted, or the evidence derived therefrom rejected, then the criminal elements would triumph and they would proclaim "crime does pay".

Here is what Commander Hall said on Williamson:

" Williamson is a contracted employee of my company. I knew Williamson before 4th May 1994. I knew him under similar circumstances. Purpose for assigning Williamson as Scales Clerk was to deceive those persons concerned with the theft of sugar that he was capable of being subverted and corrupted as they worked.

In assigning Williamson to this post I was looking for particular characteristics in the person. They were reliability, someone who was not very well known, disciplined, relatively easy to protect."

As for his involvement, this is how it was elicited by Mr. Mitchell for McCalla during cross-examination:

" Mr. Williamson is a specialist in covert operations - Remuneration sometime depends on the success of the covert operation depending on what he is assigned to do. He is paid a certain amount for what he is assigned to do - if he is successful or if he is unsuccessful he gets the same pay. Williamson and I had agreed a particular sum for his operation for Sugar Industry Authority."

It is in the light of this account that it is proper to commence the assessment of the evidence in respect of Lue and others in respect of counts one and seven.

Was there sufficient evidence against Lue, Livermore, Russell and McCalla, Reece, Davidson, Thompson, Anderson and Gordon which made it correct to call on them to answer the conspiracy charges in count one

AND

Was Her Honour correct to rule that Donald Livermore, Devon Russell Wilbert McCalla, Michael Reece and Lennox Davidson ought to answer to the charge of conspiracy to steal sugar pursuant to count seven ?

The evidence reveals that on Friday May 20. 1994, Commander Hall followed truck with Temporary Plate No. 2595 loaded with sacks of sugar through the exit gate at the Marcus Garvey Warehouse to where it was being unloaded at Lue's Wholesale. He was joined by Norman Colquhoun one of his undercover investigators. There he saw Russell. He is represented on appeal by Mr. Bert Samuels. Russell was one of those unloading the truck. At this point the following evidence emerged:

" On returning outside I saw Colquhoun. He said something to me. Someone was standing beside him when he spoke - Livermore the driver of CC 2595 was the person.

After Colquhoun spoke Livermore did not say anything. A few minutes later a large brown panel van drove up and an elderly oriental gentleman alighted from it. He walked in my direction. I identified myself to him and told him why I was there. He replied. I ascertained the name of elderly oriental gentleman. I asked him his name. I see him here today - he is gentleman in grey Jacket. (Witness points out accused Thomas Lue). He said his name was Thomas Lue. When I identified myself to Lue he said he didn't order any sugar, he knew nothing about it.

The driver of the truck produced documents. Someone else joined me there that day - Spl. Cons. Hewitt at approximately some time after midday. I can't honestly say what time. When Hewitt arrived after a brief exchange of words I left in the company of Colquhoun and we returned to Marcus Garvey Drive Warehouse."

This evidence established that the appellants Livermore, Russell and Lue were on the scene when the unloading took place. It is now appropriate to turn to the evidence of Sp. Constable Hewitt. He stated:

" I went somewhere else. I also went to 94C Constant Spring Road. I got there after 11:00 a.m. - can't say the exact time. I noticed a truck Registration 2595 (Temporary) it was parked in front of a business place. Business place was "Lue's Wholesale." I noticed that silver coloured bags were to the front and rear of truck and the middle section was partially empty. I saw Commander Hall and Mr. Colquhoun and another gentleman. I didn't know this other gentleman before. If I saw him again I would recognize him. I see him here today (witness points out the accused Livermore as the person.) "

Continuing his evidence, Special Constable Hewitt said:

" Mr. Livermore took me inside Lue's Hardware. He showed me some silver coloured bags. He said he was going to sell Mr. Lue 100 bags of sugar for \$65,000.00."

The other aspect of Livermore's involvement in this conspiracy count comes from Joseph Williamson the under-cover agent. Here is his account of his role as a scale clerk at the warehouse:

" I am a Security Consultant employed to Security Advisory Management and Services Limited. In May 1994 I was so employed. In May I was assigned to Sugar Warehouse on Marcus Garvey Drive. Operated by Sugar Industry Authority. My duties included being a Scale Clerk. As Scale Clerk I was required to weigh all motor vehicles entering and leaving the warehouse whether loaded or unloaded. To detect and identify any person who would remove bags of sugar from the Warehouse. During period I was assigned as Scale Clerk I was stationed in a Scale Room. I commenced assignment as Scale Clerk on Tuesday May 10, 1994. [Emphasis supplied].

In order to sustain the narrative and at the same time analyse the evidence in terms of the indictment which consigned the initial conspiracy to count seven, it is appropriate to insert count seven at this point. It reads :

Statement of Offence - Seventh Count

Conspiracy to Steal

Particulars of Offence - Seventh Count

Donald Livermore, Devon Russell, Elkanah McLeish, Wilbert McCalla, Michael Reece and Lennox Davidson on diverse days including the 18th day of May 1994 in the Parish of Kingston, conspired together and with other persons, to steal a quantity of sugar the property of the Sugar Industry Authority.

Then he recounts Livermore's involvement thus:

" On Wednesday May 18, 1994 at about 7:45 a.m. I was inside Scale Room at Sugar Warehouse. A Mr. D. Livermore after parking his truck Licence No. Temp. 2595 on the Scale at entrance gate of premises. He came to me by the window of scale room."

Another effective conspirator was Wilbert McCalla. His role commenced thus on Williamson's account.

" Later that morning at about 9:35 am on Wednesday 18th May 1994 Mr. McCalla Warehouse Supervisor, operating at warehouse, I see McCalla here today. He is to the left of the bearded gentleman and seated at No. 4 from left as I face dock, came to the window of my scale room and said he was going to make a move and he did not know if I was up to it. I asked " a how did yah business a go". He said he would have spoken to me later. I can't remember the exact words he used.

At about 9:45 a.m. on 18th May, 1994 (Wednesday) after McCalla and I spoke Mr. D. Livermore drove truck licence No. Temp. 2595 and loaded with bags of sugar onto the scale by the "Exit" gate of the premises."

Then the narrative continued thus:

" Mr. Livermore alighted from truck, left it on scale and came by window of scale room with the aforesaid order Serial No. 086061 for 300 bags of sugar (refined) sugar for Mussons (Ja.) Limited and handed it to me."

Of the insiders, McCalla, perhaps held the highest post. He was a warehouse supervisor. Here is how he was involved according to Williamson's evidence:

" Mr. McCalla who was standing by "EXIT" gate on premises approached the window of scale room along with Livermore. He told me, i.e. McCalla, I should not weigh the truck which was on the scale. When McCalla told me this Livermore was standing right beside him. McCalla spoke in a relatively soft voice. Livermore could have heard what McCalla said. I did as he instructed me to do. I gave McCalla the order which had been handed to me by Livermore."

In his pivotal position as scale clerk Williamson was able to observe and by skillful undercover work to facilitate the prearranged plan of the conspirators. They thought they were using him. He was observing them so as to reveal their plot. He continued thus:

" After this was done Livermore went back into truck and drove the truck loaded with bags of sugar out of the Warehouse. When Livermore drove through gate persons were at gate. McCalla was by the gate, Mr. Davidson was inside Guard house by the gate. Davidson is a Security Officer. I see him here today, he is the sixth accused from the left (witness points out accused Davidson). Apart from 7 Billing Pad I prepared for motor vehicle Licence No. Temp. 2595. I prepared no other documents for it at that time." [Emphasis supplied]

So Davidson is brought on the scene and his role will be delineated in due course. Here is how he continued his narrative to involve Livermore the driver of truck Temporary 2595 and the paymaster McCalla.

" Later that day McCalla spoke to me in relation to what had transpired. He spoke to me between 12 noon to 1 pm on the 18 th May, 1994. When he spoke to me I was inside Scale Room. McCalla said I should not re-weigh truck of licence No. Temp 2595 when it re-entered the premises. I said I would do as he instructed. [Emphasis supplied]

Later on that day at about 1:35 pm on 18th May 1994 Truck Licence No. Temp. 2595 was driven onto the scale by "Entrance" gate of the premises. It was loaded with bags of sugar. Truck was driven from the rear of the premises. Livermore presented the written order of No. 086061 for 300 bags of refined sugar for Mussons (Ja.) Limited to me by the window of the scale room in which I was. I recorded the weight of the loaded truck on the "Entrance" Scale. I then produced a Delivery Slip which I gave to Mr. Livermore with the order he had given me earlier.

At about 1:43 pm on 18th May 1994 Truck licence No. Temp. 2595 loaded with bags of sugar was driven through the "ENTRANCE" Scale. I then produced a Delivery Slip which I gave to Mr. Livermore with the order he had given me earlier."

At about 1:43 pm on 18th May 1994 Truck licence No. Temp. 2595 loaded with bags of sugar was driven through the 'ENTRANCE GATE'."

Then comes the crucial account of the act of payment to Williamson. This

is his account:

" I recall the following day Thursday 19th May, 1994 at about 4 minutes after 8:00 McCalla entered the scale room in which I was. He gave me a bundle of money in elastic bands. Jamaican money. He said that he had wanted to make a move as early as possible on that same day Thursday May 19, 1994.

The bundle of money in elastic Bands that McCalla gave me I put it in my pocket and later that evening at about 5:30 p.m. I handed it to Commander Hall of Security Advisory Management and Services Limited. The money was counted by Commander Hall in my presence, The money was all in \$100 bill denomination and each bill was circled in green and

my initials were in the circle. When money was counted it was \$15,000 to be exact. If I see money again I will be able to identify it.

(Bundle of money shown to witness).

This is the money which was marked by Hall in my presence. (Mr. Scott applies to have money tendered and admitted as Exhibit 9.) "

With this evidence it would have been appropriate for counsel for the Crown to apply to the court to add a count for attempted bribery. According to the format of the indictment it would have been Count eight.

It is now appropriate to return to the scene at Lue's Wholesale. The crucial evidence in relation to Lue was given by Special Constable Baldwin Hewitt. He said:

" A van drove up with a next Chinese man in it - a brown van. This Chinese man from van came inside the building. I identified myself to him as a policeman by means of my identification booklet.

The man said "me just a come". He said his name was Thomas Lue and he is the owner of the business place. If I see gentleman again I will be able to identify him (witness points out accused Thomas Lue the elderly chinese man). I spoke to Thomas Lue before I did so I cautioned him."

Here is what happened after the caution:

" I asked him if he ordered any sugar from Mr. Livermore. He said "me just a come, must be my wife order it." When I asked Lue question, Livermore was right beside him in the business place. I can't recall asking Lue any other question. I then went to a section in the building. Livermore took me to that section. Mr. Lue went along with us. When we went to this section Livermore said something - Lue could hear what he said. Livermore said that about 29 to 30 bags of sugar were taken off the truck. He further said that he intended to sell 100 bags to Lue for \$65,000.00 and the other 200 bags to other

customers. Lue was present and could have heard. Lue did not say anything."

Basil McLeish was another member of the constabulary force who was at Lue's Wholesale on 20th May, 1994. His evidence discloses where the sugar was unloaded and he gave evidence which implicated Livermore. He said:

" I saw this truck. I observed that the middle was partially empty. Livermore told me that if I could give him a chance he would explain why he was there. He went on to say that 200 bags of sugar was legal and 130 was hustling. It was another truck driver who told him that if he took the hustling to Lue he would buy them from him.

I did not say anything to him until he took me to one of the storeroom where he showed me 86 bags of sugar and told me that those were taken off the truck and packed in the storeroom. I instructed him to pack 86 bags of sugar back onto the truck which he did. Mr. and Mrs. Lue along with Livermore and the truck were taken to the Constant Spring Police Station.

When Livermore was giving his explanation Mrs. Lue was present. Mr. Lue arrived sometime after I was there. I can't say how long after."

The evidence which emerges from Special Constable McLeish's cross-examination was helpful. It reads thus:

" Livermore never said he was making a delivery of the sugar having showed me the document. I looked at the document. Livermore was standing behind grill in enclosed area when he said 200 bags are legal and 130 bags were hustlings.

Lue's Wholesale plays a central role as regards the conspiracy charge in count 1. There was evidence that three of those charged were there and the issue was whether from their presence and what was said they had a common intent to steal sugar which was unloaded there that day. Livermore was represented by Mr. Darby in the court below although on appeal he appeared in person. He told

McLeish that 200 bags of sugar was legal, the rest was hustlings. Lue said that perhaps the sugar was ordered by his wife. It is significant that the sugar was put in the storeroom. Livermore conducted the police officer to that area. The inference was that there was a prearranged plan to steal the sugar which Livermore stated was hustlings. In this regard *R. v. Cavendish* (1961) 2 All E.R. 856 explains the concept of possession in relation to Lue and demonstrates the necessary inference from his conduct which links him with Livermore's intention to steal. He was of one mind with the hustler Livermore and others. The following passage delivered by Lord Parker at p. 858 is apt:

" The sole question, as it seems to this court, is whether a case was made out at the end of the prosecution case which called for an answer. Certain propositions are quite clear. It is quite clear, without referring to authority, that for a man to be found to have possession, actual or constructive, of goods, something more must be proved than that the goods have been found on his premises. It must be shown either, if he was absent, that on his return he has become aware of them and exercised some control over them or - and this was the case sought to be made here - that the goods had come, albeit in his absence, at his invitation or by arrangement. It is also clear that a man cannot be convicted of receiving goods of which delivery has been taken by his servant unless there is evidence that he, the employer had given the servant authority or instructions to take the goods."

On the facts of this case the sugar was put in the warehouse at the directions of the hustler Livermore. This must have been done at Lue's prior invitation or arrangement. In such circumstances a prior plan must be the inference so that there was evidence to call on Lue and Livermore to answer to the charge of conspiracy to steal. The case of *Russell* is somewhat different. Under cross-examination by Mr. Bert Samuels, Commander Hall admitted that he was

mistaken when he said he saw Russell at Lue's Hardware. The only other evidence that could possibly link Russell with the conspiracy in count 1 comes from Joseph Williamson the undercover agent. Here is how he fared under cross-examination by Mr. Bert Samuels on the vital issue of identification:

" I agree that a large number of persons at Warehouse I saw then but I don't remember them now. Based on my assignment, I did not ask the name of the man who told me to do the similar thing for truck No. 2595. I do not know why I didn't do so. On reflection if I did things like that it certainly would have helped."

Here is the evidence in chief:

" At about 9:34 am an individual approached me inside the scale room where I was. I had seen that individual before that day on the premises of the Warehouse.

I knew that the individual worked at that time. He worked at the Warehouse where I saw him.

Individual said something. He asked me if I remembered what I had done. I see that person here today, he is the second accused from the left (witness points to the accused Russell). He asked me if I remembered truck licence No. Temp. 2595 on Wednesday the 18th May 1994. I said "Yes". He said I should do the same thing with the said truck on that day - Friday 20th May 1994."

It is clear that this was a dock identification and there was not sufficient particularity as regards his prior identification to call on him to answer. Nor did Her Honour demonstrate either inferentially or expressly in her findings that she realised that the identification of Russell was a live issue. Against that background his conviction cannot stand and this court in its judgment entered a verdict of acquittal in respect of him.

Did the Crown marshal sufficient evidence to warrant calling on the others charged on Counts one and four namely: Wilbert McCalla, Michael Reece, Lennox Davidson, Rajandra Thompson, Byron Anderson and Leroy Gordon ?

It is convenient to set out count four at this point which, is the conspiracy to steal sugar which was delivered to Anderson's place of business. As explained earlier its scope was limited by the related substantive offences and a particular truck No. 2627. There was a meeting of minds to steal sugar from the warehouse. That was the all embracing conspiracy. Some of the conspirators concentrated on the aspect at Lue's Wholesale while others confined their involvement to delivering sugar at Byron Anderson's place of business. Here are the counts relating to truck 2627 where the driver was Thompson:

Statement of Offence - Fourth Count

Conspiracy to Steal

Particulars of Offence - Fourth Count

Devon Russell, Elkanah McLeish, Wilbert McCalla, Michael Reece, Lennox Davidson, Rajandra Thompson, Byron Anderson and Leroy Gordon on diverse days including the 20th day of May 1994 in the parishes of Kingston and St. Andrew conspired together and with other persons to steal a quantity of sugar the property of Sugar Industry Authority.

Statement of Offence - Fifth Count

Simple Larceny

Particulars of Offence - Fifth Count

Rajandra Thompson on the 20th day of May 1994 in the parish of Kingston stole a quantity of sugar the property of Sugar Industry Authority.

Statement of Offence - Sixth Count

Receiving Stolen Property contrary to Section 46 (1) of the Larceny Act

Particulars of Offence - Sixth Count

Byron Anderson on the 20th day of May 1994 in the parish of Kingston received a quantity of sugar the property of the Sugar Industry Authority, knowing the same to have been stolen or otherwise unlawfully obtained.

McCalla's role was crucial in identifying the inner core of conspirators in both counts one and four. Without his inside knowledge and his link with Williamson the agreement would never have been effective. Williamson's effectiveness was enhanced by his cellular telephone and his transmitter so that he could communicate with the other members of the security team. It was by virtue of this excellent means of communication that the miscreants were followed and trapped. Here is how Williamson described his role at the scale room:

" Later that morning at about 9:45 am on Friday the 20th May 1994 McCalla called me by window to Scale room where I was. He said that only four (4) individuals should approach me concerning the matter of trucks with bags of sugar leaving the premises. (These are not his exact words. I am reporting what was said)

They were himself (McCalla), the man who approached me earlier (Russell), truck licence No. Temp. 2595 Leroy (sic) and a short brown man."

Prendergast, the short brown man, was not before the court. He was a clerk in the warehouse and the evidence suggests that he was a skillful organiser. He was introduced thus by Williamson:

Mr. Prendergast said that I should not weigh it that when truck Licence No. CC 2627 when it came to front of premises loaded with bags of sugar it should not be weighed"

Williamson continued thus:

" Apart from 18th May 1994 when I saw truck Licence No. Temp. 2595, I saw that truck again on Friday 20th May 1994. On that day at about 10:30 am the said truck loaded with bags of sugar was driven onto the scale by the EXIT gate by D. Livermore. He alighted from the truck. I was told earlier on by McCalla that I should not weigh it. I did as I was instructed. Livermore went back into the truck and drove it through the EXIT gate away from premises."

Then Williamson said:

" When he drove truck to EXIT Gate, Gate was opened. I do not know who opened it. When the truck got to the gate persons were at the gate. Mr. Davidson was inside the Guard house at the gate and McLeish was there as well. I see McLeish here today. He is third accused from left (witness points out accused McLeish).

I can't recall if anyone else was at the gate when truck got to gate. I used the transmitter I had to contact a team of Security Personnel. Can't say to whom I spoke, but I knew the team of Security Personnel. Some of the members of that team were David Hale, Junior Dennis, Operations Manager of SAM's, Mr. Cunningham, an employee of SAM's and Calquhoun an employee of SAM's

After I contacted team at about 12:53 pm on Friday 20th May 1994 someone spoke to me. In respect of this truck Temp. 2595 no documents were prepared in respect of it."

The means of transporting the sugar out of the warehouse in respect of count one was by truck Temp. 2595 driven by Livermore. The other truck used to effect the agreement charged in count four was truck CC. 2627 driven by Rajandra Thompson. Here is how, on Williamson's account, his overt acts were evidence of his involvement in the pre-arranged plan outlined in count one as well as his crucial role in count four. It must be borne in mind that the crucial overt acts in counts

one and four were effected on May 20th. The precision with which both operations were carried out was compelling evidence that there was a prior plan:

" I recall dealing with truck CC 2627. I recall this truck because something happened with that truck. At about 10:32 am on Friday 20th May 1994 truck licence CC 2627 loaded with bags of sugar was driven onto the scale by the EXIT gate by Mr. Thompson. I see Thompson here today he is No. 9 on the bench from left (witness points out accused Thompson). Thompson stopped the truck on the scale and got out of it. I did not weigh the truck because I was instructed not to weigh it. Thompson went back into the truck and drove it through the EXIT gate and out of the premises.

When truck was driven through EXIT gate persons were there. Mr. McLeish and Davidson among others were there - others names I cannot recall."

The name Davidson is linked to the conspiracies in both counts one and four as well as count seven. His role will be discussed later.

Then Williamson turns to the critical role played by Prendergast thus:

" I got instructions not to weigh truck from a Mr. Prendergast who was a Scale Clerk working at the Warehouse. I now say that Prendergast was not a Scale Clerk - he was a Clerk in the Warehouse."

It was essential to track the movements of truck CC. 2627 and here is

Williamson's account:

" After truck CC. 2627 went through gate I used the transmitter and cellular phone I had to contact a team of Security Management Advisory Personnel that was stationed outside premises. Truck CC 2627 drove through gate of premises at about 10:32 am with bags of sugar.

Later that day someone spoke to me in connection with truck CC 2627 - Prendergast spoke to me at about 12:35 pm on 20th May 1994. When he spoke to me I was in Scale room."

Then Davidson and Reece were security guards at the Exit gate . This is how Williamson portrayed them:

" at about 12:53 pm Prendergast spoke to me. He said I should not weigh the truck licence No. CC 2627 when it came on EXIT Scale loaded with bags of sugar. It was to be allowed out of the premises. When the vehicle left I should "out bound" the vehicle. OUT BOUND in this case means I should produce a document from the computer with the recorded weight of the loaded truck the date and the time.

I did as I was instructed by Prendergast. This was done at about 1:10 pm on 20th May 1994. Documents I produced on Prendergast's instructions I gave them to him. When truck CC 2627 was leaving the premises I cannot remember where McCalla was."

He continued thus:

" Apart from Davidson I knew other security personnel who worked on premises during period 18th to 20th May 1994. I see Mr. Reece in Court today. He is No. 5 in row on the left as I face the dock (witness points out accused Reece) Reece worked on 20th May 1994 at the Warehouse. I saw him that day - sometime during my tour of duty. At one time he was by the EXIT gate but he is not stationed at one place as I see him move from point to point.

Question: Do you recall what was happening when you saw Mr. Reece at the exit gate?

Answer: Mr. Reece and Mr. Davidson were in discussion about what I do not know."

It will be convenient to deal with the evidence against Davidson and Reece in counts one and four as well as count seven at a later stage.

Then the evidence that Livermore and Thompson were acting together as well as acting with Davidson and Reece was stated in the following way:

" There was someone else in these discussions - the drivers of the trucks individually. One at one time and the other at another time. That is the drivers of truck licence No. Temp. 2595, i.e., Livermore and the driver of truck Licence No. CC 2627."

Further details were recounted thus:

" These discussions were prior to the truck leaving the premises with bags of sugar.

When Reece, Davidson and Livermore were in discussion. I saw no one else. When I saw Reece, Davidson and Thompson in discussion. I cannot recall if I saw anyone else.

At the time when Livermore drove truck Temp. 2595 onto Scale at EXIT gate the scale was working.

At the time when Thompson drove truck CC 2627 onto Scale at EXIT gate the scale was working."

A significant clue to the nature of the conspiracy was provided by Williamson when he was being cross- examined by Mr. Darby counsel for Livermore. Here is the answer:

" If truck is not weighed then it would be impossible to say how many bags of sugar are on the truck."

The significant evidence involving Thompson in the conspiracy in Count four emerged during the cross-examination of Williamson by Mr. Gentles. Thompson was the driver of truck No. CC. 2627. Livermore was the employee of a haulage contractor. Thompson on the other hand was employed by his father to transport sugar to his father's clients. Both were essential to the conspiracy and were equally useful to the other conspirators. Here are Williamson's answers under cross-examination:

" As Scale Clerk I operated both incoming and outgoing scales."

Then he continues thus:

" On 20th May 1994 I recall truck CC 2627 driven by accused Thompson."

Further, he said:

" As far as I can recall the first time I saw Thompson that day was when the truck entered "EXIT" scale with bags of sugar on it. This was sometime after 10 am on Friday 20th May 1994."

In explaining the nature of his work his response to Mr. Gentles was :

" My functions as Scale Clerk was to document the weight of empty and loaded vehicles entering and leaving the premises of Warehouse and to detect any person illegally removing sugar from Warehouse. I am not required to examine gate pass. I was not instructed to do so. I was instructed to operate scale and produce the necessary documents from computer.

I did not weigh Thompson's truck that day when it drove onto the scale. I can't remember him speaking to me or presenting any documents to me.

I can't remember indicating to Thompson that he should leave but I allowed him to leave."

Then the vital link between the organiser Prendergast and Thompson was established during cross-examination thus:

" No one else in office when Prendergast and I spoke. He said that I should not weigh in relation to truck CC 2627 - the bags of sugar on it."

The equipment entrusted to Williamson to carry out his undercover work is important and was described by Commander Hall thus:

" I provided Williamson with cellular telephone and a miniature UHF Transmitter (U.H.F. transmitter is Ultra High Frequency which is identical in appearance to the pen which the Court is using). I gave Williamson certain instructions."

Just as it was important to shadow Truck No. 2595 driven by Livermore, the investigators recognised it was equally necessary to shadow Truck 2627. The first aspect of the investigation was explained thus by Commander Hall, in relation to May 20, 1994:

" Sometime later that morning at approximately 9:35 we received information from Williamson. On looking across the street I observed truck licence No. CC 2627 exit the premises through the "EXIT" gate.

I noticed that the truck was fully loaded. I saw a large number of white bags on it. I then gave instructions to personnel in second car, i.e. Gray, Hewitt and the other members of my staff. I continued to sit there."

Then comes the crucial evidence against Reece and Davidson as detailed by Commander Hall. It runs thus:

" In my return to Sugar Warehouse I gave Calquhon certain instructions. As a result he went to the IN GATE & OUT GATE of Warehouse. He return to where I was. On his return he gave the IN & EXIT Log Books. I examined these Log Books. If I saw Log Books again I will be able to recognise them.

Exhibits "6" & "7" shown to units."

Then he continued thus:

" This is the entry Log for the IN Gate. This is the one I examined.

The other one is the Log for the EXIT or OUT GATE. This is the one I received from Calquhon. I also examined the EXIT Log. I noticed something in particular. I noticed an entry in Log Book for Friday 20/5/94. (Witness now shown Exhibit 8). Entries on folio 8 with Reece's initials)."

Thereafter he said:

" I made observations re "Exhibits" 8. After making observations I searched the Warehouse premises from one side to the other. I was looking for CC 2595 and CC 2627. I did not find what I was looking for. I went back to

scale room, where I saw Joseph Williamson. Williamson spoke to me and told me something. Later that day I returned to my office - Prior to going to my office, I had occasion to go to the Denham Town Police Station. When I got there I saw truck licence number CC 2627 loaded with large white bag there."

It is not proposed to analyse the evidence against Gordon in this judgment as was explained previously. He did not attend the hearing in this court and therefore his conviction was affirmed. Suffice it to say that he was interviewed by Commander Hall and a statement taken from him. He was an employee at Jamaica Cane Product Scale the marketing arm of the Sugar Industry Authority. At the Sugar Industry Authority Commander Hall made enquiries regarding documents he had encountered on 20th May, 1994. The basis of his enquiry was that the documents were prepared there and they related to Truck No. CC 2627 driven by Thompson.

It is necessary to elicit the evidence which demonstrates that Truck No. CC 2627 driven by Thompson was shadowed. Here is the evidence of Special Constable Baldwin Hewitt:

" On Friday 20th May 1994 I was on special assignment duty along Marcus Garvey Drive, St. Andrew. I was with Commander David Hall, Mr. Calquhoun, Spl/Cpl. Preston Wray. I was in a private motor car. While in car I made observations of the sugar Warehouse. At about 11:00 am I made special observation of warehouse. I observed truck Reg. CC 2627 exit the sugar warehouse. It drove onto Marcus Garvey Drive, went west along Marcus Garvey Drive, then up East Avenue into the Greenwich Town area. We followed the truck in the car we were in. Truck after leaving East Avenue turned east along Spanish Town Road then to Beeston Street. At Beeston Street truck parked in front of business place. Business place had a sign marked "SAM'S Enterprize", 72 Beeston Street. I notice that truck had two men on the rear of truck when it exited warehouse. The truck was loaded with some silver coloured bags."

Preston Wray another special constable gave a similar account and added:

" I observed the men alighted from the truck. They went to Sam's Limited where they spoke to someone. (Mr. Darby arrives at 2:35 p.m.)

I then noticed the store room opened. I saw three (3) of the men unloading bags of sugar from the truck and was placing them in the store room. Bags were some whitish colour bags."

Then he continued thus:

" On entering the storeroom I saw a young woman in the process of counting off the sugar that were being unloaded. I also saw the driver of the truck. He was seated on some crates of drinks in the storeroom. The driver was later known to me as Rajendra Thompson. If I see him again I will recognize him.

Further he said:

" At that point I asked driver for the receipt for sugar that was being delivered. He showed me a bill marked D & G, Spanish Town Road dated 10th May 1994. The bill had a serial No. 085894. I then asked him how he was in possession of D & G bill dated 10th May 1994 to be delivering goods at SAM's Enterprize on 20th May 1994. He said the sugar was given to him by my friend "Prendy" a Clerk at the sugar warehouse to be delivered at this address. I asked the lady who was counting the sugar. When I spoke to her Thompson was present and could have heard what was said. I asked her if she ordered that particular load of sugar - she said "No."

At the end of the Crown's case the only evidence against Anderson was that at Sam's Enterprise where the sugar was unloaded, Cavel Williamson said that her boss was Byron Anderson. There was evidence from Carl James the General Manager of Jamaica Cane Products Sales Limited that on the 20th Byron Anderson paid for sugar with a Manager's cheque but that evidence never

pinpointed the time that the cheque was paid or whether the payment was a departure from the regular system.

The difficulty the Crown found was that the invoices were prepared by Leroy Gordon and although the acceptable system as described by James obliged the client to place a written order by person or by bearer it was never posited that an order by telephone was unacceptable. That was the procedure in this case. Here it is appropriate to refer to the evidence of Carl James to show the nature of the evidence.

" As a result of observation I spoke to Gordon (I see Mr. Gordon here today - witness points out the accused Gordon). I asked Mr. Gordon when he wrote the invoice for SAM's Enterprise. He said sometime after 12:00 he wasn't sure exactly when. I asked him where was the order from the company for the invoice that he had written. He said the gentleman telephoned him.

That is not accepted procedure. The acceptable procedure was for the customer to come in with an order and a cheque for the amount of sugar they required. The Clerk would then write or print the invoice according to the order. When Gordon said it was written after 12:00, it was after 12:00 noon.

We discovered that orders were being given orally to the Clerk at the window instead of proper procedure of it being a written order."

Such evidence as there was which could have implicated Anderson came after the Crown had closed its case. In such circumstances Anderson ought not to have been called on to answer a case and a verdict of acquittal must be entered in his favour. See R v Abbott [1955] 1 W.L.R. 369. However, Anderson's statement from the dock will be adverted to so as to show that if the investigators had shown more patience and cunning they would have left the sugar at Sam's Enterprise. Also they should have left some one in disguise to watch Sam's Enterprise so as

to await Anderson's arrival. In such circumstances the verdict against Anderson might have been different. Here it is important to reiterate the evidence from Carl James before the Crown closed its case:

" I asked him (Gordon) where was the order from the company for the invoice that he had written. He said the gentleman telephoned him.

That is not accepted procedure. The acceptable procedure was for the customer to come in with an order and a cheque for the amount of sugar they required. The Clerk would then write or print the invoice according to the order. When Gordon said it was written after 12:00, it was after 12:00 noon.

We discovered that orders were being given orally to the Clerk at the window instead of proper procedure of it being a written order.

I asked him why he had to print the invoice three (3) times to get the correct order for Sam's enterprise because there were two cancelled invoices before the correct one was printed. He said he had asked another Clerk in office to prepare the invoice and she had made up the invoice with the wrong quantity. I took the blue copy of invoices that were there and made photocopies of them.

I said I was familiar with Gordon's signature. I had seen him write before. I had seen him write on several occasions over the years. If I should see his signature again I believe I would recognize it."

Then here is Anderson's statement from the dock."

" On 20th May 1994 after dropping my kids at school i.e. Saint Peter and Paul, I drove down Old Hope Road. I saw Leroy Gordon turning into his workplace. I stopped him - that was about 8:10. I told him that I was sending a bearer for 300 bags of granulated sugar. I left to 72 Beeston Street and opened my business place and stayed there for a while. I left with my bearer. We left in two separate vehicles to Mutual Security Bank, Oxford Road. I purchased a Manager's cheque in the name of Sugar Industry Authority for \$230,000.00. I gave cheque to my bearer to go to Sugar Industry Authority, Sales Department. I left to attend to some other business.

During the course of the day I called my business place. Telephone rang without an answer which was unusual. Knowing the area to be a violent one I went there. On reaching there the place was closed. Some people who were standing on pavement said something to me. This led me to the Denham Town Police Station. On reaching Denham Town Police Station I saw a truck loaded with sugar. I went inside and I saw my employee Cavel Williamson in an office adjoining to where three (3) policemen were. I went in and identified myself and showed them the copy of the Manager's cheque. They took it looked at it and gave me back. The police said the orders were taken to Sugar Industry Authority. While I was there some people from Sugar Industry Authority came back with the order verifying that they were genuine and was paid for. They released Cavell Williamson along with the truck and gave her the order. The following week Monday was a holiday so I received my 300 bags of sugar on the Tuesday."

The fraudulent departure from the system and its relation to the three conspiracies

The best description of the system was elicited in the cross-examination of Commander Hall by Mr. Darby who appeared for Livermore before Her Honour. It ran thus:

" Place of duty - scale room. He is required to weigh in all incoming vehicles and prepare the necessary documentation for incoming vehicles which are then handed to drivers or their agents. After which they proceed through system until they proceed to Out-scale where Scale Clerk is required to produce the final documentation so that vehicle may "EXIT" compound. Vehicle is initially locked out of premises by the computer, it then proceeds to physical EXIT gate where particulars concerning vehicle identification, driver, identification, licence number and quantity are recorded along with time of departure by Security Personnel present at the gate."

Then he continued thus:

" Drivers, after they come to EXIT Scale, would be given certain documentation by Scale Clerk which would give them right to exit from compound.

Driver would have a copy of order, gate pass which was prepared by Delivery Clerk, a copy of the computer printout of all the relevant details concerning that order in order to exit premises. INVOICE and ORDER are one and the same."

The comprehensive account of the system however was given by Major Grant. In particular, the crucial role of the security guards Reece and Davidson will be explained. Generally, it will be shown that the scheme in which Truck 2595 on 18th and 20th and Truck 2627 on the 20th were used could only have occurred by an agreed scheme by the participants in the conspiracy. It was not suggested that all the conspirators met at any time but their overt acts demonstrated they were of one mind. Here it is pertinent to cite two relevant authorities to show how the law incorporates the appellants in the three conspiracies.

In Doot v Director of Public Prosecutions 1973 A.C. 807 Viscount Dilhorne said at p. 823:

" In Reg. v. Murphy (1837) 8 C. & P. 297 Coleridge J. said in the course of his direction to the jury, at p. 311:

'It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. You are to say whether, from the acts that have been proved, you are satisfied that these defendants were acting in concert in this matter.'

This statement of Coleridge J. has not been questioned and I take it to be well established that it is a correct statement of the law. If it is, it is not easy to reconcile it with the view expressed by the Court of Appeal, for the man who joins a conspiracy after it has been formed was not a party to the conspiracy when it was 'completed.' The fact that a man who later joins a conspiracy may be convicted of it shows that although the offence is complete in one sense

when the conspiracy is made, it is nevertheless a continuing offence'."

Then it is pertinent to demonstrate that the conspiracy was not tainted with duplicity as Mr. Charles for Reece and Davidson contended. In the following passage in R. v. Meyrick & Ribuffi (1930) 21 Cr. App. R. 94 at p. 101 Lord Hewart L.C.J. said:

" It seems to us that it was clearly put to the jury that in order to find these persons, or any of them guilty of the conspiracy charged in the first count of this indictment, it was necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other, or directly consulting together, but that they entered into an agreement with a common design. Such agreements may be made in various ways. There may be one person, to adopt the metaphor of counsel, round whom the rest revolve. The metaphor is the metaphor of the centre of a circle and the circumference. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A communicates with B, B with C, C with D, and so on to the end of the list of conspirators. What has to be ascertained is always the same matter: is it true to say, in the words already quoted, that the acts of the accused were done in pursuance of a criminal purpose held in common between them? Now, if that is the true view, it seems to us that that view was made plain to the jury."

It seems to us that with respect to the three conspiracies charged both the metaphors i.e. the centre of the circle and circumference and the chain are applicable. With regards to the centre the circle and the circumference there were three circumferences from the same centre or to put it another way there were concentric circles. There were three interlocking conspiracies and as regard the first on the 18th May 1994 in the seventh count there was the agreement but no proof of the substantive offences so none was charged. With respect to the two conspiracies of 20th May 1994 charged in counts one and four the agreements

were executed and some of the conspirators were charged with substantive offences. Although no verdicts were returned Livermore and Lue were clearly guilty of larceny and receiving, respectively, and Thompson guilty of larceny in respect of count five.

To return to the evidence of Major Grant he said:

" I am familiar with the distribution of sugar from this warehouse. The customer or person wishing to purchase sugar would have to proceed to Head Office at 22G Old Hope Road. Customer would provide a purchase order as well as the means by which to purchase sugar, that is, cash or cheque."

He continued thus:

" Purchase Order is presented to Clerk at 22G Old Hope Road. Clerk then produces an Invoice. Invoice is made of an original and two copies. Contained on Invoice would be the name of the customer, the quantity of sugar to be purchased, the type of product as it could be brown or refined sugar, etc."

The crucial figure in this aspect is Gordon who did not turn up when the appeal was being heard. At the warehouse the customer or agent would encounter the guard. Reece and Davidson were the insiders at this point. Major Grant continues thus:

" When customer or agent arrives at the entrance gate of Warehouse he would present the invoice to the Guard who is stationed there. This is Warehouse at Marcus Garvey Drive. Guard is the only person stationed at the entrance gate. Upon arrival the customer or agent would present invoice to Guard. The Guard would take the document and enter certain information in his log."

The next step was recounted as follows:

" After he records information he would return invoice to driver or customer. The Guard would then allow the customer to take his truck in onto the IN-SCALE. The driver would stop on the scale and leave his truck. He would also ensure that no passengers are left on the

truck. He then proceeds with his invoice to a window where the scale operator is also called Scale Clerk. The Scale Clerk is on western side of building while the IN-SCALE is on the eastern side."

Then the undercover agent Williamson was brought into play at a strategic point thus:

" The Scale Clerk has to ensure that the truck is on the scale. He is therefore provided with a Television Monitor so he can see if the truck is on the scale.

Scale Clerk takes invoice from customer, he enters information from invoice onto a computer which is connected to the scale.

Information entered:

- (1) The licence number of motor vehicle on scale.
- (2) The invoiced quantity of sugar
- (3) The name of customer.

That information is taken from invoice. I cannot recall anything else. He then prints what is known as a "Billing Pad." He then hands 'Billing Pad' to customer or driver. The customer or driver would then move to another window. At this window the customer would hand "Billing Pad" to Billing Clerk. He would also give invoice to Billing Clerk.

The Billing Clerk inspects the invoice against the Billing Pad to make sure that the information on both documents correspond. She also records in a book the name of customer and the quantity of sugar. After this is done she keeps the pink and yellow copies of the Billing Pad and the original of Billing Pad and Invoice is returned to the customer. Billing Pad has an original and two copies when it is produced.

Customer or Driver would go to his truck, remove the truck from the scale then he goes to the delivery area. At delivery area the driver would give invoice and Billing Pad to the Delivery Clerk."

The Delivery Clerk and one of the principal organisers was Prendergast.

Here is how his office gave him a crucial role in the system:

" The Delivery Clerk would examine the documents to ensure that they are genuine and that they correspond with each other. If he is satisfied then he instructs the forklift operator to take the amount of sugar from the Warehouse and deliver it to the customer.

Delivery Clerk checks the sugar which is placed on truck to see that no extra sugar is loaded onto truck. Also with Delivery Clerk is a Security Guard who assists Delivery Clerk to check off sugar on truck. Security Guard does not produce a document showing that he has actually checked off goods. Once loading process is completed Delivery Clerk prepares a gate pass. Gate Pass has copies. It is a standard form document.

Information on Gate Pass:

- (1) The Invoice Number,
- (2) Licence number of the truck,
- (3) Quantity and type of sugar supplied,
- (4) It would be signed by the Delivery Clerk
- (5) It also has name of Customer"

From the Delivery Clerk, the truck loaded with sugar must now return to the Scale Clerk. The conspirators found their trade so profitable that they were unaware that once the Scale Clerk was outside their control their conspiracy would be revealed. The employers had spies within their camp and the miscreants had no counter-intelligence.

Major Grant continued his outline of the system thus:

" After gate pass is prepared by Delivery Clerk it is stamped "Delivered". He would give the original and pink copy to the customer. He would also give him the original of the invoice. The Delivery Clerk would keep a copy of the invoice, yellow copy and the original of the 'Billing Pad.' The driver would then move the truck to the

OUT SCALE, OUT SCALE is opposite the Scale Clerk room. Scale Clerk room is on western side of building. It has glass windows so as to allow visual contact between the Scale Clerk and the Scale and also the EXIT Gate.

When driver takes truck to scale, he would leave truck on scale and take the documents to Scale Clerk's window. Scale Clerk's window to the end of scale is about nine to ten (9-10) yards.

After documents are handed to scale Clerk he would record the truck on the computer."

It is in this context that McCalla's instructions to Williamson not to weigh Truck No. CC 2627 or Truck No. Temp. 2595 becomes of special relevance. Here is Major Grant's account:

" When truck entered premises Scale Clerk recorded truck on IN SCALE so that information would have been there so when truck comes around he would enter information and bring back information which would previously have been placed thereon.

He would then print what is known as delivery slip.

Delivery Slip contains:

- (1) Name of Customer.
- (2) Time when truck entered the IN SCALE .
- (3) Time when truck is processed on OUT SCALE .
- (4) Licence number of Truck.
- (5) Invoice number.
- (6) Weight of sugar ordered on invoice.
- (7) Actual weight of sugar on truck.
- (8) If there is a difference in the Weight it would record that difference.
- (9) The name of scale operator.
- (10) Space for the driver to sign.

Those are things I can remember. Actual weight of sugar is arrived at."

Then he rounds off this aspect thus:

" When the truck goes on IN SCALE it would record the "tare weight" that is, weight of empty truck. When the truck moves onto OUT SCALE it would record the "laden weight", that is, the weight of the truck and weight of sugar. What is not printed is the weight of truck. What is printed is the invoiced weight, that is, difference between the tare weight and the laden weight. Tare weight is not recorded on document. The laden weight is not recorded on document. Actual weight of sugar is difference between tare weight and laden weight."

Major Grant continued thus:

" After Delivery Slip is produced Scale Clerk keeps the pink copy (it has an original and two copies). He then gives back to customer: (a) the Invoice, (b) original gate pass (c) pink copy of gate pass (d) original delivery slip and (e) yellow copy of delivery slip.

After this the driver would move the truck from the scale to the gate. The driver then hands over his document to the gate attendant who is stationed at EXIT Gate. The documents are inspected by a Security Guard who is stationed at the gate. Both of those persons do a physical check of the items on truck as against documents. If both are satisfied, they have separate logs in which they record certain information from the different documents. [Emphasis supplied]

After that is done they would give the following documents to drivers:

- (1) His original Invoice
- (2) Original Delivery Slip
- (3) Pink copy of Gate Pass

They would keep the original gate pass, yellow copy and Delivery Slip (that is, gate attendant)."

It was at this point that Major Grant highlighted the roles of Reece and Davidson. He put it thus:

" Thereafter the truck would be sent on its way. The effect of not weighing truck at the OUT SCALE and truck being allowed to leave compound:

One would not know how much sugar had been removed from the Warehouse. (Emphasis supplied).

Security Guards stationed at the IN GATE and OUT GATE at the Sugar Industry Authority in May 1994 were employed to Dual Security Company. These Security Guards were supervisors. Guards normally reported for duty at 7 a.m. and left at 7 p.m. Supervisors reported at same hours."

Continuing his evidence on the crucial roles played by Reece and Davidson, Major Grant said:

" Supervisor would remain on compound. If he has to leave it would be written on his report. Apart from guards at the IN and OUT Gates there were other Dual Guards there on location. The guards who worked on compound were not permitted to change their stations on the compound with the other guards.

I was familiar with the Security Guards who worked at the IN and EXIT Gates in May 1994. I was also familiar with the person who was the Supervisor. Supervisor was Mr. Reece .

I see Reece in here today (witness points to gentleman with white beard and green floral shirt). Accused identified as the Accused Reece.

Guard who worked at OUT gate is Mr. Davidson. He is the person seated to right of Reece in lavender shirt. (Accused identified as Lennox Davidson).

The Supervisor is required at the end of each tour of duty to prepare a report on his duty for the day and there is a set form for him to do his report. I produce the blank form.

During time when Reece was Supervisor at company I had occasion to observe him sign his name. I

would say I had seen him sign on numerous occasions. I can't say specific number of times. If I were to see his signature I would be able to recognize it."

The logbooks were exhibited and the basis for introducing them was outlined thus:

" Log Book is a hard cover book. It contains instructions on the cover as to how the book should be used. I prepared those instructions required to be written in log book:

IN GATE:

- (1) Date
- (2) Registration number of vehicle
- (3) Name of driver
- (4) Quantity of sugar invoiced
- (5) Space for guard to sign
- (6) Time of arrival:

OUT GATE

- (1) Date
- (2) Registration number of vehicle
- (3) Driver's name
- (4) Gate pass number
- (5) initials of Guard allowing vehicle to go out
- (6) Quantity and type of sugar leaving."

The crucial dates on which it was proved that Reece and Davidson deliberately failed to carry out their duties were the 18th and 20th May, 1994. Log books reveal their complicity in all conspiracies. Here is how the evidence was recounted by Major Grant:

" Guard Supervisor's report should have been prepared by the supervisor at the end of his tour of duty. The document I prepared is a Standard Form Document. Guard/Supervisor would fill it out at the end of his tour of duty and sign it.

I am familiar with Reece's signature and handwriting. WITNESS IS NOW SHOWN A DOCUMENT.

This is a Guard/Supervisor's Report for 18th May 1994. I see a signature on it that I recognize. It is the signature of Mr. Reece"

Thus he stated:

" This is the Guard/Supervisor's report for 20th May 1994. I see the signature of Mr. Reece on it which I recognize.

Mr. Scott applies for Guard/Supervisor's Report of 18th May 1994 to be tendered and admitted as Exhibit 4 and that dated 20th May 1994 to be tendered and admitted as Exhibit 5"

After further evidence Her Honour ruled as follows:

" ENTRIES ON FOLIO 8 OF EXHIBIT 6 WITH REECE'S INITIALS TENDERED AND ADMITTED AS 'exhibit 8'."

The conclusion from this examination together with previous evidence was that by following the instructions of McCalla, and Prendergast, the undercover agent was able to observe and participate in the subversion of the system. By so participating this inner core facilitated the work of Davidson and Reece who failed to perform their duties at the exit. The log books exhibited were telling evidence against these two. Then the drivers Livermore and Thompson executed the delivery of the sugar. This was in essence the conspiracies for which they were called upon to answer.

What were:

(a) The defences

(b) The Findings of Fact by Her Honour?

It is extraordinary for an accused called on to answer in the Resident Magistrate's Court to give an unsworn statement. Yet this was the course adopted by all who were concerned with respect of count one the conspiracy involving truck No. 2595 driven by Livermore. McCalla, Reece, Davidson, Lue, Thompson, Anderson and Gordon were the parties concerned.

So far as count four went, the parties concerned were McCalla, Reece, Davidson, Thompson and Gordon. Truck No. 2627 was driven by Thompson. As for the third conspiracy the parties concerned were Livermore, McCalla, Reece, Davidson. Truck No. 2595 was again driven by Livermore. Without exception, all parties involved elected to give an unsworn statement.

The defences raised were unimpressive. Respectively, the drivers Livermore and Thompson claimed they were given sugar by one Hamilton to deliver to La Lue, and Thompson claimed Prendergast asked him to deliver sugar to Beeston Wholesale. The others gave bland denials that they were not involved in any conspiracy, and Davidson denied he was at the gate on the 20th as only Reece was there that day. In view of these lamentable excuses Her Honour rightly found against the accused in her findings of fact.

In her findings which she recorded in 52 paragraphs she outlined the system and made her findings as regards the participants in the conspiracy. We have already adverted to the findings against Russell and Anderson and for the reasons adumbrated found that they ought not to have been called upon. The

judgment of guilty against them cannot stand. They were set aside and verdicts of acquittal entered. Otherwise the verdicts on counts one, four and seven are affirmed as we indicated in the judgment of this court 25th April, 1997. The finding at paragraph 22 was appropriate. It reads:

"22. Find that on Thursday 19th May 1994 at approximately 8:04 am McCalla entered scale room and gave Williamson bundle of money in elastic bands which when later counted amounted to \$15,000.00. McCalla then told Williamson he wanted to make a move as soon as possible."

Having made that finding, since counsel for the Crown omitted to ask her to add a count, she ought to have added a count of attempted bribery to the indictment pursuant to section 190 of the Judicature (Resident Magistrate's) Act which reads

" The Magistrate may at all times amend all defects and errors in any proceeding, civil or criminal, in his Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made, with or without costs, and upon such terms as to the Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made."

Then section 278 referring specifically to indictments reads:

"278. At any stage of a trial for an indictable offence before sentence, the Court shall amend or alter the indictment so far as appears necessary from the evidence or otherwise, and may direct the trial to be adjourned or recommenced from any point, if such direction appears proper in the interest either of the prosecution or of the accused person."

This court is accorded similar powers pursuant to section 302 which reads:

" It shall be lawful for the Court of Appeal to amend all defects and errors in any proceeding in a case tried by a Magistrate on indictment or information in virtue of a special statutory summary jurisdiction, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made as to the Court may seem fit"

In our discretion we elected not to resort to this power on this occasion, but we thought prudent to advert to those provisions so that they will be exercised in future where the circumstances so warrant.

Also, we did not disturb the sentence of nine months with hard labour imposed by the learned Resident Magistrate in respect of each of the appellants.