

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 41/05**

**BEFORE: THE HON. MR. JUSTICE PANTON, P.  
THE HON. MR. JUSTICE COOKE, J.A.  
THE HON. MR. JUSTICE DUKHARAN, J.A.**

**KEVIN HARVEY v R**

**Mr. O'Neil Brown for the Appellant**

**Miss Kamar Henry for the Crown**

**May 11, 12 and 15, 2009**

**ORAL JUDGMENT**

**DUKHARAN, J.A.:**

1. The appellant Kevin Harvey was tried and convicted on three counts of simple larceny on the 10<sup>th</sup> October 2005 in the Savanna-la-mar Resident Magistrate's Court. He was sentenced on the 3<sup>rd</sup> November 2005 to 1 year imprisonment on each count with sentences to run consecutively.
2. The trial commenced on the 12<sup>th</sup> April 2005 and spread over some 16 days ending on the 10<sup>th</sup> October 2005. The case against the appellant arose out of several incidents involving the theft of motor vehicles. Count 2 of the indictment charged the

appellant and one Dwayne Singh with stealing a 1998 Toyota Surf on the 11<sup>th</sup> February 2003, the property of Sharmon Hinds. Count 3 on the indictment charged the appellant that he and Jerwayne Salmon on the 27<sup>th</sup> March 2003 stole a 2000 Mitsubishi Montero Sport, the property of Dr. Janine Dawkins and on count 5 that on the 14<sup>th</sup> April 2003, he and Jerwayne Salmon stole a 2003 Mitsubishi Montero Sport, the property of Anthony Allison.

With respect to count 2, Stephen Broughton testified that he is a mechanical engineer and he knows the owner of the said motor vehicle, Miss Sharmon Hinds.

3. He said that on the 12<sup>th</sup> February 2003 he and Miss Hinds went to the Constant Spring Police Station where she gave a statement to the Police concerning her missing Toyota Surf. He said that on the 24<sup>th</sup> April 2003 he went along with Miss Hinds to the Frome Police Station in Westmoreland where she identified the said Toyota Surf motor vehicle as hers in the presence of the appellant, who said "This is the vehicle what mi did have". Mr. Broughton said he was familiar with the vehicle as he had driven it before and done mechanical repairs on it. He said the front was changed with a different crash bar on it. The chassis number was also changed and the seats were changed from velvet to leather. He identified other features of the vehicle such as the colour and the stereo system.

He said that the number on the chassis was different as the last three digits were not correct and the licence plate on it was 4730 BS. Miss Hinds never gave evidence as at that time she was away in the United States of America.

4. Detective Sergeant Asa Campbell testified that he went to the home of Dwayne Singh, the appellant's co-accused, where he saw the Toyota Surf motor vehicle. He said Mr. Singh gave him a key which he used to open the driver's door of the vehicle; that when he searched the vehicle he found documents relating to the vehicle in the glove compartment and these were exhibited as exhibit 9b and were in the name of the appellant. Mr. Singh said he got the vehicle from the appellant who swapped it with him for a Toyota Harrier.

Detective Inspector Leonard Parsons testified that he was a serial number restoration expert. He examined several vehicles including the Toyota Surf in question. He said the engine and the chassis numbers were tampered with.

5. Miss Margaret Leslie, the Collector of Taxes from the St. Andrew Collectorate at Constant Spring testified that from her records, licence No. 4730 BS was issued to one Kevin and Christine Harrison for a 1990 Nissan and that exhibit 9, which was the registration certificate with the appellant's name on it, was fraudulent as it was not issued from that office.

6. In respect to count 3, Dr. Janine Dawkins testified that on the 27<sup>th</sup> March 2003 at about 7:00 p.m. she parked her Mitsubishi Montero Sport motor vehicle registered 2241 AS at a parking lot on Red Hills Road in St. Andrew where she attended a function. On her return the vehicle was missing. On the 16<sup>th</sup> April 2003 at about 6:45 p.m. she was in Negril, Westmoreland, when she observed her Montero Sport parked at

a supermarket with a different licence plate numbered 5494 DN. She informed the police and later saw the vehicle at the Negril Police Station. She had the documents for the vehicle in her possession. She observed that the LA number on the licence disc was similar to the one on the copy of the registration certificate that she had with her. She said she identified the vehicle in the presence of the appellant who said "the lady say it is her vehicle, it is her vehicle".

7. Colin Smith testified that sometime in February of 2003 he had a discussion with the appellant for the purchase of a Tundra pick up. They entered into negotiations and he paid the appellant \$400,000.00 as a deposit. There was a written agreement with the total cost being \$700,000.00. On the 15<sup>th</sup> March 2003 the appellant told Colin Smith that he was unable to get the vehicle as it was delayed at the wharf. They re-negotiated and the contract was changed from the Tundra to a Montero Sport. An additional sum of \$265,000 was given to the appellant after he received the Montero Sport from the appellant along with photo copy papers for the vehicle. On the 16<sup>th</sup> April 2003 the vehicle was retrieved by the police. The agreement for the receipt of this vehicle was tendered in evidence.

8. Detective Inspector Leonard Parsons testified that he examined the Montero Sport vehicle and found no tampering with either the chassis or the engine numbers.

Detective Sergeant Dwight Daley testified that when he spoke to the appellant about the vehicle he told him that it was Jerwayne Salmon who gave him the vehicle to sell.

Miss Sophia Jarrett of the Kingston Collectorate testified that the registration certificate given to Mr. Smith by the appellant was not issued from the Kingston Collectorate as stamped on the registration certificate. The numbers on it were not yet in issue at the time and the signing officer was not employed there.

9. With respect to count 5, Anthony Allison testified that on the 14<sup>th</sup> April 2003 about 10:30 p.m. he drove his 2003 Mitsubishi Montero Sport licence no. 7686 DY to the National Housing Trust in Savanna-la-mar and left it in the car park. On his return his vehicle was missing. He reported it stolen. On the 28<sup>th</sup> April he went to the Negril Police Station where he identified the said vehicle to the police. On the 3<sup>rd</sup> May he identified the vehicle in the presence of the appellant who said nothing. Detective Sergeant Asa Campbell said that on the 16<sup>th</sup> April 2003 he spoke to the appellant who was in custody at the Negril Police Station who told him that the Montero Sport was at Mr. Clive Vassell's garage in Negril. He took the appellant to the garage where the said vehicle with the said registration plate 7686 DY was seen there. Mr. Vassell said that it was the appellant who took the vehicle there for repairs. Detective Inspector Parsons said that upon examining the said vehicle there was tampering with the chassis and engine numbers. However he was able to recover the original numbers by way of etching. It was similar to that on the genuine documents issued to the owner Mr. Allison.

10. The appellant gave evidence. He told the court that in relation to count 2 that he bought the Toyota Surf from Jerwayne Salmon, his co-defendant at trial. He said he

paid him \$650,000 for a four wheel drive pickup, but he got the Toyota Surf while he was awaiting the pick-up. He said he took the Surf to a garage and gave instructions for changes to be done to the seats and console. He said he did not get a receipt from Jerwayne Salmon for the (\$650,000.00) and that he got the money from his employer to do whatever he wanted to do with it. He said he swapped the Surf for a Toyota Harrier from Singh. He denied that he stole the vehicle.

11. With respect to count 3, the appellant testified that he saw Mr. Smith who told him that he wanted a pick up to buy. He called Mr. Salmon and indicated to him Mr. Smith's interest. Mr. Salmon told him that he gets vehicles from auction off the wharf. After about two weeks Mr. Salmon called him and said he had a Montero Sport he wants to show Mr. Smith. In the cross examination he said Salmon dealt with all the paper work. He did not tell Mr. Smith he could not get the vehicle until all the money was paid. He knew that the vehicle was valued for more than the \$700,000.00 he sold it for.

12. Mr. Brown for the appellant sought leave to argue additional grounds. In respect of ground 2 he argued that the learned Resident Magistrate erred in not allowing a 'no case' submission made regarding the appellant as the Crown presented insufficient evidence to ground the offence. The main thrust of his argument was that the owner of the Toyota Surf motor vehicle never gave evidence; that no evidence was taken from the purported owner Sharmon Hinds that the vehicle was stolen, or in the alternative no written statement from her was admitted or application made to have the statement

admitted into evidence under the Evidence Act. He submitted that the learned Resident Magistrate gave three consecutive sentences of which she could only have given two. He cited two authorities to the court, **Regina v Brendon Blair** and **Regina v Everalld Dunkley**. We agreed with Mr. Brown that the learned Magistrate could only have given two consecutive sentences in the circumstances. He stated that the sentences were manifestly excessive despite the fact that the appellant gave active cooperation to the police in recovering other stolen vehicles and that the Resident Magistrate never gave credit for his good record.

He submitted that the appropriate sentence would have been a suspended sentence and a large fine.

13. In response to the submissions made on count 2, Counsel for the Crown, Miss Henry, conceded that the count was not proven as larceny was not proven. This appears to be a concession and in our view we do not agree with either the defence or Crown Counsel on that aspect of the matter. On perusal of the transcript of the evidence of Detective Sergeant Milan Davidson at page 94 reveals that when Miss Hinds pointed out the vehicle, the appellant was present. She pointed out the vehicle as her property which was stolen on the night of 10<sup>th</sup> February 2003. Miss Hinds asked the appellant if that was the condition in which he bought the vehicle. The appellant responded in the affirmative, but he changed the seat because he loves leather. This bit of evidence in our view given by Sergeant Davidson would ground a charge of larceny.

14. In this case it was a question of findings of fact by the Resident Magistrate. She found that in relation to count 2 she did not believe the appellant, likewise in the other counts, that the appellant was untruthful in his evidence.

15. We have looked at the findings of the learned Magistrate and we see no reason to disturb them so far as they relate to the convictions. In our view there was overwhelming evidence before the learned Resident Magistrate. Accordingly the appeal against conviction is dismissed. With respect to the sentences imposed, a factor we have taken into account and through no fault of the appellant, is the delay of 3½ years between the date of conviction and the hearing of the appeal. Although we are of the view that the sentences imposed by the learned Resident Magistrate are not inappropriate for this type of offence, we feel that in the circumstances of this case, given the unusually long period between the sentencing and the hearing of the appeal, it would not be just at this stage to impose a period of imprisonment. In addition, we bear in mind the appellant's good reputation prior to these offences. We allow the appeal against sentence and set aside the term of imprisonment imposed on each count and substitute therefor a fine of \$500,000.00 or 6 months imprisonment on each count.