

NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 62/97

**BEFORE: THE HON MR. JUSTICE FORTE, P.
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.**

R V KENNETH CLARKE

Dennis Daly, Q.C. and Wayne Denny for appellant

**Miss Paula Llewellyn, Senior Deputy Director of Public
Prosecutions (Ag) and Miss Tanya Lobban for Crown**

27th and 28th November 2000 and October 25, 2001

HARRISON, J.A:

The appellant, by motion, sought leave to adduce the fresh evidence contained in the affidavits filed. This matter was referred to this Court by the Governor General consequent on a petition submitted to him under the provisions of section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act, (the "Act").

After the hearing, we dismissed the motion. These are our reasons in writing. The applicant was convicted of capital murder on 8th May 1997. His application for leave to appeal was dismissed by this Court on 30th July 1999. His petition for special leave to Her Majesty in Council was dismissed on 6th March 2000.

The fresh evidence, considered by this Court pursuant to its powers under section 28(b) of the Act, was contained in the affidavits of Kirk Rose, Tensie Rose and Dayne Denny. The governing principles which guide this Court on the admissibility of fresh evidence, in the exercise of its discretion, were formulated by Lord Parker, C J in **R v Parks** [1961] 46 Cr. App. R. 29. That approach was followed by this Court in **Samuel Lindsay and Henry McKoy** SCCA 7 and 8/99, delivered 18th December, 1999. (unreported) and recently in **R v Deon McTaggart** SCCA 57/95 delivered 6th March, 2000, (unreported). In the exercise of its discretion, the Court must consider and be satisfied that, the said evidence:

- (1) was not available at the trial;
- (2) is relevant to the issues;
- (3) is credible, that is, capable of belief, and
- (4) if it had been given at the trial might have created a reasonable doubt in the minds of the jury as to the guilt of the applicant.

At the trial, Kirk Rose was the principal witness for the prosecution. He gave detailed evidence of being in the company of the applicant and two other men, in a car which was driven to the vicinity of Roehampton Drive in Kingston, where the men on seeing some other men, left him in the car, after which he heard some gun shots. The men, including the applicant, returned running to the car, which he the witness drove away as directed. Minutes late, the applicant told the witness Kirk Rose, that he the applicant had "just kill the cableman" and the following day told him that he was going to collect money for the said killing. He accompanied the applicant. On a later date,

Rose took the police to the applicant who was arrested, charged, and subsequently convicted of capital murder of David Darby, "the cableman."

Mr. Daly Q.C. for the applicant argued that the evidence contained in the affidavits of Kirk Rose, and Tensie Rose was credible and ought to be heard by this Court. Even if this Court was not satisfied that the evidence of Kirk Rose was true, it raises an issue and therefore the witness should be heard.

Miss Llewellyn for the Crown submitted that the said evidence was not fresh evidence and further it is not capable of belief. The witness Kirk Rose gave detailed evidence which was not shaken in cross-examination at the trial. Neither did his statements of 17th March 1996 and 20th March 1996, reveal any inconsistency between them, nor with his evidence at the trial. She concluded that, even assuming that the evidence of Kirk Rose contained in the affidavit was credible, there was other evidence at the trial sufficient to satisfy the jury of the guilt of the applicant.

In order to determine whether or not the evidence contained in the affidavits of Kirk Rose and Tensie Rose, is fresh evidence, within the principles of **R v Parks** (supra) this Court has to consider the said evidence, as it relates to the evidence given at the trial.

The affidavit of Kirk Rose dated 4th March 2000, relates that "in or around early 1996" he ran away from St. Ann, because the police were looking for him in respect of "a wounding" committed by him in St. Ann "in or around January 1996". Arriving in Kingston he stayed with his aunt Mrs Rose, at 19 Myrie Avenue. "While there for two (2) weeks", policemen

including Superintendent Tony Hewitt, Inspector Chipper Grant and Detective Sergeant T. Williams came to the house and asked for " ... the no teeth man from St. Ann." Not having found him, the police took his aunt but returned ten minutes later and took him away to the Constant Spring police station. He was questioned as to where he was "on the particular day" when one Robert Darby was murdered, and he told them that he was in St. Ann. He then said:

"They proceeded to ask me for my cousin Kenneth Clarke and I took them to Mackai Lane on Spanish Town Road where Kenneth's girlfriend lived. There Detective Williams and Chipper Grant went into the yard and returned with the former grabbing Kenneth in the waist ..."

They returned to the Constant Spring Police Station from where Kenneth accompanied the police who returned with Donovan Starrad and one Phippott. Rose said that at the said station, when asked, he said that he knew only his cousin Kenneth, and not the other two men. The police told him that apart from being wanted by the "country police", he was also wanted for Mr. Darby's murder and they had a witness who "could sentence all of us." He said he denied knowledge of the matter as "I had only arrived from the country two weeks before." He said that Superintendent Tony Hewitt told him that he knew that he had nothing to do with the killing but he wanted him to give him some information, and along with Inspector Chipper Grant and Detective Sergeant Williams, told him that they wanted him to sign a statement and go to court and say that he was with the men in the car when they killed Mr. Darby. They promised to send him abroad and "give me

a start in life". He said that he insisted that he knew nothing and refused to do as they asked.

He said that on the first two days at the Constant Spring police station he was repeatedly beaten by policemen. "Mr. Hewitt slapped me and Detective Williams beat me repeatedly with a strip of old tyre rubber and Chipper Grant kept hitting me in the head with a baton ... This continued into the second day until I agreed to do as they asked." He said that he was instructed to tell the Court that Donovan drove the car to the scene and the three of them came out and went to Mr. Darby and shot him, firing six shots before running back to the car where he was sitting listening to music. They then asked him to drive the car and whilst driving they told him "Is somebody we just drop down," and they put him out of the car at the Plough Bar off Spanish Town Road and drove off. He said that he was then to say that he and Kenneth get up in the night and went to the man who paid to have the killing done and collected \$90,000.00. Kenneth was supposed to have gone inside and he remained outside. He then said:

"I was kept at the Constant Spring Station until the next morning when Detective Sgt. Williams came and took me to the Passport Office and got out a passport for me telling me that they were going to send me abroad if I gave the statement against the other three.

I signed the statement they had prepared because they promised to send me abroad and because they had told me they had a witness, and if I didn't want to do it they could still send the four of us to prison.

I now give this statement because I realize the wrong I have done and because of my conscience. At present it is with much difficulty that I sleep at nights."

In response to the said affidavit of Kirk Rose dated 4th March 2000, Detective Inspector Errol Grant in his affidavit dated 7th November, 2000, stated that on 17th March, 1996, he recorded the words of a cautioned statement given by Kirk Rose, who was not told by him or any police officer what to say, that Rose was not beaten nor did he complain that he was, that Senior Superintendent Hewitt was not involved in the investigations and that it was he Grant who arranged that Rose stay in Yallahs, St. Thomas. Assistant Commissioner Osbourne Dyer, in an affidavit dated 7th November, 2000, stated that he was in charge of the Area 5 and witnessed the cautioned statement on 17th March, 1996, taken by Detective Inspector Grant. He himself recorded the statement of Kirk Rose given on 20th March, 1996, and that neither he nor anyone told Rose what to say. He did not promise Rose to assist him to go abroad and Senior Superintendent Hewitt was not involved in the investigations. Det. Sgt. Errol Williams, in his affidavit dated 8th November, 2000 stated that on 7th March, 1996, he took Kirk Rose from 19 Myrie Avenue, in a police party that did not include either Det. Insp. Errol Grant, or Senior Superintendent Anthony Hewitt. At Constant Spring police station, while interviewing Kirk Rose, he said he "wished to tell me all he knew," that he contacted Det. Insp. Errol Grant, who then came to the station, as also Reverend March and a Justice of the Peace, that Assistant Commissioner Osbourne Dyer was also present. Kirk Rose's statement was recorded on 17th March 1996, and he was not told what to say; that he asked Kirk Rose on 17th March, 1996, for his cousin Kenneth Clarke and Rose pointed out the house to him; and that after Kirk Rose gave

the cautioned statement on 17th March, 1996, he was "viewed as a Crown witness." After Kirk Rose was released he chose to stay at 171/2 Mountain View Avenue, then lived at Yallahs, St. Thomas and then at the Constant Spring police station in a wooden building to the rear of the CIB office. He assisted Kirk Rose after the trial, to get a passport, as he said that his mother was willing to take him to the United States. He was the investigating officer in the case against Kenneth Clarke and others for the murder of David Darby and he made no promise of anything including the passport, to Kirk Rose, in exchange for his statement. He did not beat nor did anyone beat Kirk Rose, nor did Rose complain of being beaten. All the said police officers denied the allegations and complaints of Kirk Rose in his affidavit dated 4th November, 2000.

Kirk Rose filed a further affidavit dated 23rd November 2000, referred to as a "Supplementary affidavit", in response to the affidavits of the above police officers. Therein, he said that:

"On the day of my arrest, being the 17th day of March 1996, I did not give a signed statement to the Police. ... I gave the caution statement on the third day and Inspector Grant, Sgt. Williams and Superintendent Dyer were all present with the Justice of the Peace who, sat drinking something from a flask bottle in his lap which I thought was rum. He was writing at the same time."

He further said that on the first day at Constant Spring Inspector Grant hit him on the head with a big book saying, "uno kill me friend", and Sgt. Williams on one occasion hit him with the said book and also on another occasion with a sand stone. He was in jail at Constant Spring "for several weeks" and was "never free to go wherever I chose." He concluded:

"After I was at Constant Spring for a few weeks, I ran away because I was afraid to go to court and tell lies and during this time I went to Mountain View to stay with a friend called Shawn who I knew from Myrie Avenue. The police did not know I was going there and only knew of Shawn, Mickey and Rohan after I was recaptured when I asked them to help me recover some clothes I had left at Mountain View. I am not sure if I complained to the social worker about the beatings I received as I knew that complaining would not help me, and further I thought that if I did so they would not send me abroad and give me any more money."

The evidence of the witness Kirk Rose as contained in his cautioned statement of 17th March, 1996 was in no respect contradictory of his statement of 20th March, 1996. The latter statement was an expansion of the former with more details, including the fact of the payment of \$90,000 "for the hit job." The witness Rose never denied, in his affidavit of 4th November, 2000, that he gave a cautioned statement on 17th March, 1996, and this Court is of the view that it was not then being challenged. It was only so refuted in his "supplementary affidavit" dated 23rd November, 2000, after having received the affidavits of the police officers, in challenge of his of the 4th November, 2000. The cautioned statement dated 17th March, 1996, containing the signature of the witness Kirk Rose at six (6) places, each signature having been witnessed by Senior Superintendent Dyer, Det. Cpl. Johnson, Rev. March and a Justice of the Peace, therefore still stands unchallenged.

Miss Llewellyn for the Crown pointed out that at the trial the cross-examination of the witness Kirk Rose, covered 137 pages of transcript, and his evidence remained unshaken. This Court notes that he was cross-

examined by three counsel, two of whom were quite experienced senior counsel. His narrative at the trial was consistent with his statements of 17th March, 1996 and 20th March, 1996. The only exceptions were his denials that he told the police that **(i)** he was an apprentice mechanic in St. Ann and **(ii)** that he and Danny (Starrard) would speak sometimes. We regard it as quite unlikely, that a witness such as Kirk Rose, a woodworker by trade, who agrees that he can write but asked if he could read, answered "Not so good, sir", could have given evidence at the trial and maintained his story consistent with his earlier statements, unless he was speaking the truth and from his own knowledge. It is unlikely that he was diligently reciting what the police had told him to say. Accordingly, the evidence which was sought to be led as fresh evidence is less than credible.

Detective Inspector Errol Grant gave evidence at the trial that Kirk Rose took him on 17th March, 1996 to various places, namely, firstly in the vicinity of the Chinese cemetery on Waltham Park Road, then to a spot on Waltham Park Road about three chains from the lights at Waltham Park Road and Hagley Park Road, and then by a route along Waltham Park Road across Molynees and Cassia Park Road through the Cassia Park Gully, onto Red Hills Road, Elizabeth Avenue, Mannings Hill Road to Roehampton Drive. This conduct of the witness Kirk Rose displays an intimate knowledge of the events of the 24th February, 1996 and coincides with his detailed statements of 17th March, 1996 and 20th March, 1996. It is therefore quite likely that he himself did give the latter statements to the police, and that makes the "fresh evidence" sought to be tendered less than credible.

It is very significant that nowhere in the latter affidavits of 4th March, 2000, and 24th November, 2000, does the witness Kirk Rose state that he did not take the police along that said route and point out specific places.

In addition, the witness Kirk Rose, on a visit to the locus on Roehampton Drive, was able to point out certain specific points, for example, a bend in the road around which the men went after the car stopped, as also the pink wall near where the car was parked. The Court is of the view that this is a further indication that the current stance of the witness Rose refuting his said earliest statements to the police is not capable of belief.

The affidavit of Tensie Rose dated 1st May, 2000 was also sought to be viewed by this Court as "fresh evidence," and in the circumstances must also be subject to the test, previously recited. Tensie Rose, the aunt of Kirk Rose and the applicant, lives in St. Ann. She said, inter alia:

"That I am a farmer at Blooms Hall Estate, Cave Valley, in the parish of St. Ann and the Aunt of Kirk Rose and Kenneth Clarke.

That I have lived with my parents Inez Rose and Ashton Rose (both now deceased) until 1995 when I moved to another location about two (2) houses away. Even though I moved, I would spend most of the day at my parents house where I would cook and wash for my father and my nephew Kirk Rose, and I would still sleep there about three times a week.

Kirk Rose was born at this house and I would see him daily until he left for Kingston on a Friday during the second week of March, 1996.

That he used to come to Kingston with my mother when she was alive and would assist her with her vending activities at the Coronation Market and as far as I am aware, he has never lived in Kingston or spent more than a few hours before 1996.

On a Friday in the second week of March 1996, he came to my house and told me he wanted to go to Kingston to his Aunt Eloise Rose, who is my sister and the mother of Kenneth Clarke. He said he had asked his grandfather (my father) for money to go but his request was refused. He then asked me for a bus fare and I gave him One Hundred Dollars (\$100.00).

On Saturday after he left, I heard in the neighbourhood from Cecil Morris, a furniture maker, that Kirk had broken into his shop on the previous Thursday, and had stolen his tools and that was why he had run away to Kingston.

On the following Tuesday, my sister (Kenneth Clarke's mother) came to St. Ann and told us that Kirk and Kenneth along with two other men had been arrested for the murder of a man named Mr. Darby.

I was surprised to hear this since Kirk had only left St. Ann the previous Friday and could not have been involved in, or know anything about a murder committed on the 24th February 1996.

I was sure of this, since on that date, my sisters Eloise and Angella Rose, my brothers Dennis, Ransford and Arnett, along with other family members including Kirk, spent most of the day painting and bushing and cleaning my mother's grave.

That while the case was actually going on, my sister again visited St. Ann and told me that Kenneth's Lawyer, a woman by the name of Miss DaCosta wanted to see me.

I went to see Miss DaCosta at her office in Richmond Park, in the parish of Kingston on or about April 1997 and she asked me where Kirk was on the 24th February 1996 and I told her that I saw him everyday until he left for Kingston on the 2nd week of March 1996. After taking my statement she told me she wanted me to come to court to tell the court what I had told her.

I went to Circuit Court in Kingston during the trial in 1997 and saw Miss DaCosta who told me that the Judge could not wait on me and had said that the case must be finished away with."

The unchallenged evidence at the trial was that the witness Kirk Rose was held by the police on Sunday 17th March 1996.

Tensie Rose stated that she:

"... would see him daily until he left for Kingston on a Friday during the second week of March 1996."

She continued:

"On the following Tuesday my sister ... come to St. Ann and told us that Kirk and Kenneth along with two other men had been arrested for the murder of a man named Mr. Darby."

The nature of Tensie Rose's evidence contained in her affidavit suggests that Kirk Rose left St. Ann on Friday the 15th day of March, 1996, for Kingston where " ... he has never lived or spent more than a few hours before 1996."

Kirk Rose himself said in his affidavit dated 4th November, 2000, that when he was held by the police on 17th March 1996 he had been in Kingston "... for two (2) weeks." Tensie Rose could not therefore have given him "... bus fare one hundred dollars (\$100)" on Friday 15th March, 1996, nor could she have seen Kirk Rose daily until he left for Kingston " ... on Friday 15th March 1996." Kirk Rose, on the facts in his affidavit, had already gone to Kingston on or about 3rd March, 1996.

Furthermore, because one of the principles enunciated in ***R. v. Parkes*** (supra) which govern the admissibility of "fresh evidence" is, whether the evidence was available at the trial, the circumstances in which the evidence of Tensie Rose was not heard must be examined.

The transcript of the trial reveals that on Monday the 5th day of May 1997, when the case for the applicant Kenneth Clarke was being conducted, his counsel, one Mrs. DaCosta, advised the court of the absence of the defence witness, Tensie Rose. She said, at page 733:

"We have one other witness, Miss Tensie Rose, who lives in St. Andrew, and she has been coming all of last week, albeit she gets here a little late because she takes the public transportation. I have called several times and have not heard her. Her testimony is vital to the defence of Mr. Kenneth Clarke, so that my application at this time is for an adjournment, if the court will allow, so that those two witnesses will be present tomorrow morning."

His Lordship, the trial judge, responded and the following dialogue ensued, at page 734:

"HIS LORDSHIP: I think so. Yes, Mrs. DaCosta, why is it that you have not got your witness here? You have had all the week end. You told me you were ready from Friday but why it is that you are now asking for an adjournment? This matter is going on for such a long time.

MRS. DaCOSTA: I am surprised the witness is not here. She came prepared on Friday to give evidence but we did not call her. We were not ready for her. I asked her to be here Monday morning sharp. She is not yet here. I can give no ...

HIS LORDSHIP: How were you applying? You don't know whether she is coming tomorrow morning, so why are we going to waste time?

MRS. DaCOSTA: My Lord, I am being advised by my learned senior that my only recourse if the court allows the recourse is for her to come tomorrow morning. If she is not here I will have to relinquish any such request, but at least I could have her relatives go for her to make sure that they bring her tomorrow, go for her tonight and bring her."

Encouraging the defence to be more diligent in bringing the witness, His Lordship adjourned the matter at 12.40 p.m. until 2.00 p.m. for the defence witness Tensie Rose to appear. At 2.25 p.m. on the said day, the witness not being present counsel Mrs. DaCosta addressed the Court in this way, at page 739:

"We have relatives in court today who will leave here upon the court's ruling that the case for Mr. Clarke may be adjourned until tomorrow, who will go to Thatch Walk, St. Ann and bring that witness tonight and have the witness sleep over and be here tomorrow morning then there is no further application that the defence for Mr. Clarke can make."

The application for an adjournment was granted.

On the following morning of 6th May, 1997 when the trial was resumed, the name of the said witness Rose was called; there was no answer. Counsel Mrs. DaCosta did not address the Court nor give an explanation in respect of the absence of the witness. No further application for an adjournment was made. Counsel said to the Court, at page 776:

"So, the defence for Mr. Clarke has no alternative but to close, but the other civilian witnesses we were going to call are not here. We therefore, have no alternative but to close."

From the above account, one cannot argue that the evidence of Tensie Rose, was "not available" at the trial. It is therefore less than accurate where Tensie Rose stated, in paragraph 12 of her affidavit:

"I went to Circuit Court in Kingston during the trial in 1997 and saw Miss DaCosta who told me that the Judge could not wait on me and had said that the case must be finished away with."

We are of the view that the evidence contained in the affidavit of Tensie Rose is not credible, and that she was a witness who was available at the trial.

Although Kirk Rose, in his affidavit, stated that he ran away from St. Ann "in or around early 1996" and the police were looking for him for "wounding in or around January 1996," Tensie Rose stated that she heard that the reason why Kirk Rose "ran away to Kingston", was that he had broken into Cecil Morris' shop and stole his tools on the previous Thursday "presumably Thursday the 14th May 1996." The Court cannot ignore this further major contradiction in the proposed fresh evidence.

In a cautioned questions and answers dated 22nd March 1996, which was admitted in evidence and read to the jury, Donovan Starrad, said that Kirk Rose accompanied the applicant, in his Starrad's car on 24th February 1996.

In another cautioned questions and answers dated 17th March 1996 by the applicant, which was also admitted in evidence and read to the jury, he the applicant confirmed that Kirk Rose had been living in Kingston. "About two months now." This is evidence placing Kirk Rose in Kingston from "about" January 1996. Although both documents were challenged by the respective makers, they constitute evidence supporting the evidence given at the trial by Kirk Rose that on the date of the murder on 24th February 1996, he Rose had been in Kingston selling bag juice, "two months and two weeks now."

The Court is of the view that the evidence sought to be put forward would be relevant. The proposed affidavit evidence of Kirk Rose may be

classified in the circumstances, as "not available at the trial." However, for the reasons stated, we do not find the evidence to be capable of belief, nor that if the evidence had been led at the trial it would have affected the decision of the jury. It cannot be categorized as fresh evidence.

Accordingly the motion was denied.