JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 39/95

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE GORDON, J. A.
THE HON MR. JUSTICE PATTERSON, J.A.

R v ALLISTAIR DOWNER

Lord Gifford, Q. C. for Appellant

Miss Deborah Martin for Crown

9th, 10th November, 1995 & 5th February 1996

GORDON, J A

The appellant was convicted in the Home Circuit Court on the 9th March, 1995 of the murder of Charles Needham on 8th December, 1992 and sentenced to imprisonment for life. Leave was granted for him to appeal the sentence imposed on 21st March, 1995 and at the hearing Lord Gifford, Q. C. sought and was granted leave to appeal the conviction after he was allowed time to consult the appellant. Leave to argue supplemental grounds of appeal was also granted.

Three witnesses testified for the prosecution, Dwight Needham, Harold Foster and George White. These men were working on a construction site along Windward Road in Kingston while the deceased, the foreman on the work site,

sat across the road. The appellant walked by them going towards the deceased. Dwight Needham, son of the deceased, heard the appellant remark in passing him that he and his father are fools. Mr. George White heard the remark as "The old man a ediot." Mr. Foster observed the appellant had a knife in his hand. The appellant approached the deceased and they were next observed exchanging blows, then they hugged each other and wrestled. The deceased was observed holding his bloody left breast with one hand.

Dwight ran to the assistance of his father and the appellant ran off chased by Dwight and others. The appellant was chased, held, beaten and later taken to the police station; the deceased was taken to hospital and was pronounced dead on arrival. The witness never saw the deceased with a weapon at any time. The deceased died from a stab wound to the left chest which penetrated the left ventricle.

The appellant gave evidence in his defence. He said he worked on the site and had been told there would be no work done that day. He discovered this was false so he approached his supervisor the deceased and reproached him. Harsh words passed between them and the deceased attacked him with a stone, pinned him against a fence and was hitting him. He "pulled his knife because he was hitting me in the head with the stone". He pushed his knife and Dwight Needham joined the affray and struck him with a shovel. The deceased and himself separated and he moved away followed by the deceased, he saw the deceased stumble and fall and he ran,chased by the witness Dwight who

struck him several blows with a shovel. The knife fell from his grasp and he was apprehended by several workers who set upon him and beat him with sticks and shovel. He was handed over to the police and was taken to hospital for his injuries to be treated.

Self-defence and manslaughter arising from provocation were issues which arose on the defence. The learned trial judge addressed both issues in his summation. Lord Gifford, Q.C. however urged grounds of appeal which claimed that the directions were erroneous. the grounds are set out below -

> 1. On the issue of self defence the learned Trial Judge erred in law in his direction to the Jury in the following respects:
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> a. He failed to make any reference to the age of the Appellant at the relevant time, which was 14 years and 1 month. It is submitted that the Appellant's age was a relevant circumstance for the Jury to consider in relation to the issues of honest belief and reasonable force.
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> b. He failed to direct the Jury to the effect that the person defending himself cannot weigh to a nicety the exact measure of his Defensive action: See Palmer vs R (1971) 55 Cr. App. R 223. It is submitted that such a direction was particularly required in the case of an accused of tender years.
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> 2. On the issue of provocation, the learned Trial Judge, in directing the Jury on the issue whether the provocative conduct would have caused a reasonable person to lose his self

> control, failed to direct the Jury that the reasonable person was a person having the power of self control to be expected of an ordinary boy of fourteen years: See **DPP vs Camplin** (1978) 67 Cr. App. R. 14."

Lord Gifford, Q. C. conceded that the directions on self-defence were fair. He however submitted that in this case having regard to the facts, a "Palmer direction" was indicated. This was particularly so he submitted, as "reasonable" must contemplate the age of the applicant and the agony of the moment. He referred to and adopted Lord Morris of Borth-Y-Gest opinion as stated in **Palmer v. R** [1971] 55 Cr. App. R. 223 at pp 241-242 and applied in **R v Shannon** [1980] 71 Cr. App. R. 192 at page 195.

The directions to which Lord Gifford, Q.C. referred are at pages 28-29 of the summing-up thus:

> "Now, you will recall earlier when I told you that self-defence is a complete answer to a charge of murder. If you so find that a person is acting in self defence it is a complete defence, and he would have to be acquitted of the charge of murder. So this is what the law says; a killing in lawful self-defence is no offence at all. Self defence is lawful if a person honesty believes that he is being a target and that he is in imminent danger of death or serious bodily injury, even though his belief is mistaken and he uses such force as is reasonable in the circumstances to resist or defend himself against that attack. A person who honestly believes that he is going to be attacked, does not have to wait for th cker to strike the first blow. The ci cums.ances might just

> make him pre-empt that strike and make this strike himself.
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> But, Mr. Foreman and members of the jury, what I have to tell you is this; it is for the prosecution to satisfy you that the accused was not acting under lawful self defence once self-defence is raised. Self-defence in this case is raised on the defence's case, but there is no duty on the accused to show that he was acting in self-defence. The onus remains throughout on the prosecution and if after consideration of all the evidence you are left in doubt, whether the killing may have been in lawful self-defence, the proper verdict would be one of not guilty. If you, therefore, come to the conclusion that the accused honestly believed or may have believed that he may have been under attack and that force was necessary to protect himself from the attack or threatened attack; and you find that the force used was reasonable under the circumstances, then the prosecution has not proved their case.
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> If from the accused's own evidence you find that he was acting in self-defence or you are not too sure whether or not he was acting in self-defence, then you have to say he is not guilty because in that case the prosecution would have not made you feel sure of his guilt."

The test in self defence is subjective and the directions above clearly directed the jury to apply that test to the applicant before them. The accused they saw was a young man in his teens, he had testified as to his age, 14 at the time the incident occurred, so there could be no doubt that they were to

consider his case in the light of all the circumstances. The effect of the entire summing up must be considered and we find it convenient here to couple the second ground of appeal. In his directions on provocation the learned trial judge told the jury at pp 31-32:

> So it is for you to consider, Mr. Foreman and members of the jury, if an ordinary man of the same age as this accused man - you will recall him saying that at the time of this incident he was fourteen years of age - if an ordinary man of the same age, taking into account his social status and background from which he came, if that conduct firstly, would have caused him to lose his self-control and would have caused a reasonable person to behave as he did. That is what you will have to consider."

The jury were directed to consider the thoughts, the belief, the actions and reactions of the applicant a person of the age of 14 years at the time of the incident.

Two versions of the incident were placed before the jury. The prosecution and the defence - self defence. On the issue of self-defence it must be remembered that their Lordships in **Palmer vs. R.** (supra) said, per Lord Morris at page 241:

> "In their Lordships' view, the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only

> common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide."

Having seen and heard the witnesses, including the applicant, testify, the jury rejected self-defence and provocation. We are of the view that the summing-up of the learned trial judge was adequate, in all respects fair, and that in directing the jury on provocation he drew their attention to a contemplation of the age of the accused in their determination of the application of the subjective test in self-defence and provocation. The direction on provocation fell within the direction emphasized by Lord Diplock in the penultimate paragraph of his judgment in **DPP vs. Camplin** [1978] 67 Cr. App. R. 14 at page 21:

> "In my opinion a proper direction to a jury on the question left to their exclusive determination by section 3 of the Homicide Act 1957 would be on the following lines. The judge should state what the question is, using the terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his

> self-control but also would react to the provocation as the accused did."

We find that both grounds of appeal fail.

In the appeal against sentence Lord Gifford, Q C submitted that imprisonment for life is not a lawful or proper sentence because of the provisions of section 29(2) of the Juveniles Act. He further submitted that Parliament must have had in mind the provisions of the Juvenile Act when the amendment to the Offences against the Person Act was passed in 1992. Before the amending Act capital punishment was the sentence for murder but by section 29(1) of the Juveniles Act this sentence could not be imposed on a person who was a Juvenile. The amending Act now provides in section 3A for imprisonment for life being the mandatory sentence on conviction for non-capital murder, but this he said is impermissible to be imposed on a Juvenile by virtue of the provision of section 29(2) of the Juveniles Act which states:

> "29. - (2) A juvenile shall not be sentenced to imprisonment, whether with or without hard labour, for any offence, or be committed to an adult correctional centre in default of payment of any fine, damages or costs."

The proper sentence to be imposed Lord Gifford, Q. C. submitted is that provided in Section 29(3);

> "29 - (3) Where a young person is convicted of an offence specified in the Third Schedule and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained <u>for such</u>

> period as may be specified in the sentence. Where such a sentence has been passed the young person shall, during that period notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including an adult correctional centre) and on such conditions as the Minister may direct and while so detained shall be deemed to be in legal custody." [Emphasis added]

At the conclusion of the trial the learned trial judge imposed the sentence stipulated by law, that of imprisonment for life. He postponed to the following day the consideration of the fixing of a time before which the appellant should not be considered eligible for parole. The following day he invited counsel to address him on the sentence imposed having regard to the provisions of the Juveniles Act. Counsel made submissions and at the end the learned trial judge referred to the relevant sections of the Act and confirmed the sentence already imposed in this manner:

> "Mr. Downer I have a duty to carry out and as I have been sitting here listening I have come to the decision that the sentence of the court has to be carried out. The sentence for the crime, non-capital murder, for which you have been found guilty, is one of imprisonment for life. As I have already indicated that whatever is to take place from now, or wherever you are to be kept, is a matter for the proper authorities to decide on that issue. But as far as this court is concerned the sentence is that you be imprisoned for life."

The Offences against the Person (Amendment) Act, 1992 did not amend any of the provisions of the Juveniles Act and as it stands the Juveniles Act continues to provide the protection the law affords juveniles. Hence on conviction of capital murder a person under 18 years old at the time of the commission of the offence is protected by Section 29 (1) of the Juveniles Act. On conviction of non-capital murder the sentence fixed by law is imprisonment for life. This is one of detention for a period which is specified. The Minister under the provisions of Section 29(3) of the Juveniles Act determines how and where the sentence is served.

Murder is an abhorrent crime and the punishment for it must be severe. Where the trial judge in his discretion does not stipulate the period of incarceration that must be spent before parole may be considered then the provisions of the Parole Act apply and parole may be considered after he has served seven years in custody. The trial judge not having indicated a period of incarceration before parole the specified period falls to be determined by the Parole Act.

The appeal is dismissed the conviction and sentence affirmed.