CITATION: R. v. Forcillo, 2016 ONSC 4850
COURT FILE NO.: CR-14-10000434-0000
DATE: 20160728

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	*Milan Rupic* and *Ian Bulmer*
	)	for the Respondent
Respondent	)	
	)	
– and –	)	
	)	
JAMES FORCILLO	)	*Peter Brauti*, *Lawrence Gridin* and *Bryan Badali*
	)	
Applicant	)	for the Applicant

REASONS FOR SENTENCE

THEN J.:

[1] Counsel have brought a constitutional challenge with respect to s.239(1)(a)(i) of the *Criminal Code* first, on the basis that the mandatory minimum punishment of five years for attempted murder constitutes cruel and unusual punishment and accordingly infringes s.12 of the *Charter* and, secondly, on the basis that s.239(1)(a)(i) is overly broad as it captures conduct beyond the purpose of the section and accordingly infringes s.7 of the *Charter.*

[2] As I have found that s.239(1)(a)(i) does not infringe either s.12 or s.7 of the *Charter* I have no choice but to sentence Officer Forcillo to at least the mandatory minimum sentence of five years specified in s.239(1)(a)(i) of the *Criminal Code.*

[3] It is the position of the defence that given the court's conclusion with respect to the constitutional challenge the appropriate sentence is the mandatory minimum sentence of five years. It is the position of the Crown that the appropriate sentence is one of eight to ten years.

[4] In order to achieve a just and appropriate sentence I approach my task as guided by C.J. McLaughlin in *R. v. Ferguson*, [2008] 15 C.R. 96 at paragraph 15 where she stated: "the appropriateness of a sentence is a function of the purposes and principles of sentencing set out in ss.718-718.2 of the *Criminal Code* as applied to the facts that led to the conviction. I will deal first with the facts that lead to conviction.

BACKGROUND

[5] On July 27, 2013, Police Constable Forcillo was on duty responding to an emergency call when he shot and killed Sammy Yatim who was brandishing a knife aboard a TTC streetcar.

[6] During the course of the encounter between Officer Forcillo and Mr. Yatim which lasted approximately 50 seconds, Officer Forcillo fired a volley of three shots which based on the medical evidence caused the death of Mr. Yatim. The first volley of shots was the subject of the second degree murder charge at trial.

[7] As a result of the first volley Mr. Yatim fell on his back onto the floor of the streetcar. Officer Forcillo assessed the situation for approximately six seconds and fired a further six rounds at Mr. Yatim causing serious injuries to his genital organs and his lower abdominal area. The second volley of six shots was the basis of the count of attempted murder at trial. The medical evidence indicated that given the mortal wounds from the first volley the wounds from the second volley did not contribute to the death or accelerate the death of Mr. Yatim. The

evidence of Officer Forcillo and other police witnesses was that Mr. Yatim was alive during the second volley. However, the medical evidence indicated that Mr. Yatim had been paralyzed from one of the shots in the first volley which had shattered his spine and accordingly did not feel the impact of the shots in the second volley. Also, the medical evidence indicated that Mr. Yatim was in the process of dying during the second volley as one of the shots from the first volley had ruptured his heart. He expired within minutes of the second volley of shots.

[8] Officer Forcillo testified at his trial and relied on the defences provided by sections 25 and 34 of the *Criminal Code*.

[9] On January 25, 2016, the jury acquitted Officer Forcillo of second degree murder which is the subject of Count 1 and the first volley of shots, but convicted Officer Forcillo of attempted murder charged in Count 2 which is the subject of the second volley of shots.

[10] With respect to Count 1, second degree murder, the intent for murder pursuant to s.229(a)(ii) of the *Criminal Code* was conceded by the defence and the defence of justification pursuant to s.25 of the *Criminal Code* as well as self-defence under s.34 was advanced. The verdict of acquittal is consistent with the finding by the jury that Officer Forcillo believed on reasonable grounds that it was necessary to use lethal force for the purpose of self-preservation from death or grievous bodily harm. In other words, the conduct of Mr. Yatim toward Officer Forcillo was such as to threaten death or grievous bodily harm and accordingly Officer Forcillo had reasonable grounds to believe it was necessary to shoot Mr. Yatim in order to preserve himself and those under his protection from death or grievous bodily harm.

[11] With respect to the Count 2 alleging the attempted murder, which refers to the second volley, the jury was instructed that it was required to find the specific intent required for murder under s.229(a)(i) and that the Crown was required to negative both the defence of justification under s.25 and self-defence under s.34 of the *Criminal Code* beyond a reasonable doubt. As well, because of the reference to "bodily harm" in the wording of Count 2, the Crown was also required to prove that Mr. Yatim was alive during the second volley. Accordingly, by virtue of the conviction for attempted murder the jury must have found that at some point during the second volley Officer Forcillo did not believe on reasonable grounds that it was either necessary or reasonable to discharge his firearm with the intention or likelihood of causing death or bodily harm in order to preserve his life or those under his protection from death or grievous bodily harm. The jury must also have concluded that at that point since the discharge of his firearm was not necessary or reasonable, the force was excessive pursuant to section 26. Finally, at that point the jury must also have found Officer Forcillo intended to kill Mr. Yatim who was alive.

[12] It should be noted that with respect to Count 2 the jury was instructed by way of a "rolled-up" charge on the issue of the specific intent for attempted murder as follows:

> With respect to Count 2, the issue is simply whether Officer Forcillo had the specific intent to kill. If Officer Forcillo was acting in an unthinking, instinctive or impulsive manner or in circumstances of stress or fear, that might lead you to have a reasonable doubt about whether he had the specific intent to kill at that moment, if you have that doubt, you must find him not guilty of attempted murder.

[13] Having established the findings that the jury must have made as a result of their verdict in convicting Officer Forcillo of attempted murder it is my task to outline the relevant facts for sentencing purposes having in mind the direction of the Supreme Court in *R. v. Ferguson*, [2008] 15 C.R. 96 at paragraphs 16-18.

[14] Initially, however, it is necessary to deal with the pivotal submission of the defence that, consistent with the jury's verdict on Count 2, this court should find that Officer Forcillo was lawfully permitted to fire one or more of the initial rounds in the second volley and the implications of that finding with respect to sentencing for the conviction on Count 2.

[15] The submission is contained at paragraph 23 of the Defence factum as follows:

> 23. Similarly, the verdicts are completely consistent with a finding that Officer Forcillo at all times believed that he was lawfully permitted to continue shooting, as he subjectively perceived that Mr. Yatim continued to pose an imminent threat of serious bodily harm or death. There is no evidence that can prove beyond a reasonable doubt that Officer Forcillo was lying when he explained the basis upon which he acted. In fact, it is not inconsistent with the jury verdict to find that Officer Forcillo was initially justified in starting a second volley when he observed Mr. Yatim re-arm himself with the knife and misperceived him appearing to be in the midst of getting up, and that the second volley became unreasonable and unnecessary only after the first couple of shots. The most reasonable and consistent interpretation of the conviction for attempted murder in light of the acquittal for second degree murder is that it was the continued firing of the weapon during the second volley after Officer Forcillo's grounds to use deadly force were no longer objectively reasonable or necessary that underlies the verdict of guilty on attempted murder.

[16] I reject the submission for reasons which I will develop. Initially it is necessary to delve briefly into the factual background of this submission. After the first volley, Mr. Yatim fell on his back on the streetcar platform. Officer Forcillo testified that he assessed the situation of Mr. Yatim for approximately six seconds applying his training to consider AIM, i.e. whether Mr. Yatim had the ability, the intent and the means to inflict death or grievous bodily harm. Officer Forcillo concluded that Mr. Yatim met these criteria and further that he was an imminent threat. The conclusion that Mr. Yatim was an imminent threat is important. As a result of his training Officer Forcillo knew the difference between a potential threat, as a threat that could happen, and an imminent threat that was either ongoing or about to happen shortly into the future. He also

knew from his training that if the subject was merely armed he constituted only a potential threat and that he was not to shoot. He was trained to shoot only if a person constituted an imminent threat.

[17] Officer Forcillo concluded Mr. Yatim was an imminent threat for three reasons.

[18] He observed that as a result of the first volley Mr. Yatim had lost possession of the knife but had rearmed himself by placing the knife with his left hand back into his right hand while lying on his back. Secondly, he observed that Mr. Yatim had an angry look on his face and thirdly, he observed that Mr. Yatim had risen to a 45 degree angle in the process of getting up in order to renew the attack.

[19] However, it is conceded that the video evidence of the second volley establishes beyond a reasonable doubt that prior to and throughout the second volley Mr. Yatim did not raise himself up to a 45 degree or attempt to regain his feet but that his back remained on the floor of the streetcar after the first volley and throughout the second volley of shots.

[20] This evidence is crucial as the defence asserts that Officer Forcillo misperceived Mr. Yatim appearing to be in the midst of getting up.

[21] The jury was instructed with respect to the application of mistake of fact in connection with both the defence of justification under s.25 and self-defence under s.34. The defence submits that on the basis of the verdict alone it is impossible to determine if the jury found that Officer Forcillo notwithstanding his misperception initially had an honest belief that Mr. Yatim constituted an imminent threat and that accordingly the initial rounds of the second volley were reasonable and necessary but that the continued use of lethal force in subsequent rounds were no

longer reasonable or necessary as such force had become excessive. On the other hand, it is also impossible to determine whether the jury found that Officer Forcillo did not believe that Mr. Yatim was attempting to get up and accordingly did not have an honest and reasonable belief that Mr. Yatim was an imminent threat in which case none of the shots in the second volley were reasonable or necessary. Accordingly it falls to me to make the requisite findings of fact.

[22] For the purpose of sentencing I am satisfied beyond a reasonable doubt that Officer Forcillo did not misperceive Mr. Yatim raising himself to a 45 degree angle attempting thereby to get up to continue the attack. It follows from this finding that given the evidence of Officer Forcillo, which is consistent with the video, his decision to shoot was based solely on his observation that Mr. Yatim had rearmed himself. However, based on Officer Forcillo's training that observation is consistent only with Mr. Yatim being a potential threat in which case Officer Forcillo was trained not to shoot. I am satisfied beyond a reasonable doubt that prior to and during the second volley that based on all the evidence Mr. Yatim's conduct was consistent only with him being a potential threat and not an imminent threat.

[23] The defence submits that there is no evidence that can prove beyond a reasonable doubt that Officer Forcillo was lying when he explained the basis upon which he acted. It is entirely possible that Officer Forcillo over time has come to believe that he misperceived the actions of Mr. Yatim. However, the video is powerful evidence that demonstrates conclusively that what Officer Forcillo says occurred did not occur. Moreover, the misperception is inconsistent with the focused observations by Officer Forcillo of Mr. Yatim rearming himself with the knife and of his facial expression and indeed also inconsistent with the minute and detailed observations made by Officer Forcillo of Mr. Yatim's facial expressions, demeanour and actions which led

him to conclude that Mr. Yatim was an imminent threat prior to the first volley. While I accept that stress can interfere with perception to some degree, Officer Forcillo did not testify his misperception was a product of adrenaline flow, panic or stress but rather due to the elevated location of the body on the streetcar platform as well as the lights and sirens from the police cruisers. Finally, the evidence of Dr. Miller tendered by the defence does not assist Officer Forcillo. Dr. Miller testified that in critical stress situations some police officers may or may not perceive a threat to be greater than it actually is by a process of “priming” and “magnification”. If once exposed to actual stress situation a subsequent exposure to a similar stress situation may "prime" the officer to regard the nature of the threat as greater than it actually is (magnification).

[24] Dr. Miller also testified that he did not examine Officer Forcillo so he was unable to testify as to whether this process applied to him. Most significantly, Dr. Miller did not testify that the phenomenon of priming and magnification can induce hallucinations so that a police officer can see things that do not exist.

[25] To summarize, I find as a fact, beyond a reasonable doubt and based on all of the evidence that Officer Forcillo did not misperceive that Mr. Yatim raised himself 45 degrees in order to stand up to renew the attack but based his decision that Mr. Yatim was an imminent threat and thereby his decision to commence to fire the second volley on his observation that Mr. Yatim had rearmed himself with the knife and not on the observation that he rose to a 45 degree angle in the process of getting to his feet. I find as a fact that Officer Forcillo knew from his training that Mr. Yatim in rearming himself was only a potential threat and accordingly, I conclude that Officer Forcillo shot Mr. Yatim precipitously contrary to his training at the commencement of the second volley and throughout the second volley.

[26] It follows from this that in the absence of a mistaken belief that Mr. Yatim constituted an imminent threat all of the shots in the second volley were not only contrary to his training, but unreasonable, unnecessary and excessive. In my view, this conclusion is consistent with the jury's verdict and their necessary findings of fact that at some point, the shots in the second volley were unreasonable, unnecessary and excessive.

[27] Having dealt with the significant issue concerning which of the shots in the second volley are relevant for sentencing purposes I adopt the following version of facts pertaining to the conduct of Officer Forcillo for sentencing purposes.

[28] Officer Forcillo and his partner, Officer Fleckheisen, were the first responding Officers to a "hotshot" call indicating that a man on the streetcar was armed with a knife. No injuries were reported.

[29] Upon arrival Officer Forcillo exited his vehicle and drew his firearm. He was directed by a bystander to the streetcar where Mr. Yatim was standing between the open doors on the platform of the streetcar.

[30] Officer Forcillo advanced toward Mr. Yatim with his firearm in the shooting position pointing at Mr. Yatim who was brandishing a knife with a four inch blade.

[31] Just prior to assuming his position 10 feet directly in front of Mr. Yatim Officer Forcillo ordered him to "Drop the knife, Drop the knife, Drop the fucking knife." Mr. Yatim responded by hurling insults to the effect of "You're a pussy, you're a fucking pussy." Officer Forcillo issued several more commands to drop the knife to which Mr. Yatim did not comply. Officer

Fleckheisen holstered her weapon. Officer Kim arrived to assist Officer Forcillo and stood beside him with his weapon drawn pointed at Mr. Yatim.

[32] As a result of his observations of Mr. Yatim's conduct Officer Forcillo formed the view that Mr. Yatim was a person in crisis as a result of drugs or mental illness and requested Officer Fleckheisen to call for a taser.

[33] Although Officer Forcillo understood that verbal de-escalation was an effective tool in dealing with persons in crisis he decided not to utilize it because Mr. Yatim had not responded when Officer Fleckheisen attempted to engage Mr. Yatim in conversation concerning the possible presence of passengers.

[34] With the arrival of Officer Kim, Mr. Yatim began to retreat from the front of the platform into the area of the front passenger seats.

[35] As Mr. Yatim backed up Officer Forcillo issued the following warning "If you take one step closer I will shoot you, I'm telling you right now."

[36] Mr. Yatim remained in his position off the platform for at least seven seconds during which period Officer Forcillo did not attempt to communicate with him but during which he observed Mr. Yatim appearing to be making a decision with an angry look on his face, to flick his knife, and then take a step back onto the platform causing Officer Forcillo to believe that an attack was imminent.

[37] Officer Forcillo issued two further commands, "Don't move" and "Drop it" but Mr. Yatim responded by saying "No".

[38] Officer Forcillo determined lethal force was justified and reasonably necessary and fired a volley of three shots from the Glock firearm containing 15 hollow point bullets which had been issued to him as a police officer. All three shots inflicted serious wounds to Mr. Yatim' s arm, heart and spine. He aimed center mass as he was trained to do to stop the threat. Counsel conceded that in doing so he had the intent specified in s.229(a)(ii) of the *Criminal Code.*

[39] After the first volley of shots Mr. Yatim fell backwards onto his back onto the platform of the streetcar. He was mortally wounded and paralyzed below the waist. Even though Officer Forcillo knew that Mr. Yatim had been hit by one or more of the shots he did not know the extent of Mr. Yatim's injuries.

[40] During the ensuing six seconds he assessed the conduct of Mr. Yatim in accordance with his training and decided to fire the second volley of six shots. I find as a fact beyond a reasonable doubt that prior to the second volley Mr. Yatim was contained within the streetcar, that Officer Kim, with his gun drawn, stood beside Officer Forcillo but did not shoot and that Officer Forcillo knew that several other Officers were on scene but did not know how many.

[41] Based on the video which proves conclusively that Mr. Yatim made no attempt to get to his feet to renew the attack and based on all of the evidence I have found as a fact beyond a reasonable doubt that Officer Forcillo was not under a misperception that Mr. Yatim was attempting to get to his feet by raising himself 45 degrees to renew the attack.

[42] Taking into account the evidence of Officer Forcillo which is consistent with the video and all of the evidence I find beyond a reasonable doubt that Officer Forcillo based his decision that Mr. Yatim was an imminent threat and thereby his decision to commence to fire the second

volley on his observation that Mr. Yatim had rearmed himself with the knife and not as he testified on any observation that Mr. Yatim rose to a 45 degree angle in the process of getting to his feet. I find as a fact beyond a reasonable doubt that Officer Forcillo knew from his training that Mr. Yatim in rearming himself with the knife was only a potential threat. Accordingly, I conclude that Officer Forcillo shot Mr. Yatim precipitously contrary to his training at the commencement of the second volley and throughout the second volley.

[43] At no time prior to the second volley did Officer Forcillo attempt to communicate with Mr. Yatim notwithstanding that he had obviously been injured by the first volley. Officer Forcillo explained his failure to do so by virtue of his preoccupation with his assessment of Mr. Yatirn's conduct while he lay on the ground. Given that I have found that there was no misperception of Mr. Yatim raising himself to precipitate an attack I find beyond a reasonable doubt that there was ample opportunity for Officer Forcillo to communicate with Mr. Yatim by engaging in verbal de-escalation or to issue commands in accordance with his training in order to allow Mr. Yatim to relinquish the knife. No such opportunity was afforded to Mr. Yatim. Indeed, in this regard the actions of Officer Forcillo prior to the first volley stand in marked contrast to his actions prior to the second volley. During the first volley, notwithstanding that he was engaged in an assessment of Mr. Yatim's conduct while Mr. Yatim was actually advancing toward him he extended an opportunity to Mr. Yatim to comply by commanding him to not move and drop the knife. Officer Forcillo only commenced firing when Mr. Yatim said “no”.

[44] By virtue of its verdict in convicting Officer Forcillo of attempted murder the jury has found that he had the specific intent to kill Mr. Yatim in circumstances where his action in shooting Mr. Yatim was unjustified, unnecessary and unreasonable.

[45] It is common ground that Officer Forcillo intended to shoot each of the six bullets at the centre mass of Mr. Yatim.

[46] I turn now to the Purpose and Principles of Sentencing applicable to this case contained in ss.718-718.2 of the *Criminal Code* and which are set out as follows:

> **718. Purpose** – The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> > (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> >
> > (b) to deter the offender and other persons from committing offences;
> >
> > (c) to separate offenders from society, where necessary;
> >
> > (d) to assist in rehabilitating offenders;
> >
> > (e) to provide reparations for harm done to victims or to the community; and
> >
> > (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
>
> **718.1 Fundamental principle** -- A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> **718.2 Other sentencing principles** -- A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > …
> >
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

> (iii.l) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> …
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
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> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[47] I begin with the fundamental principle of sentencing which s.718.1 of the *Criminal Code* mandates. The sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[48] In my view Trotter J. in *R. v. Ljeskovica,* [2008] O.J. No. 4935 (S.Ct.J.) aptly articulates that attempted murder is one of the most serious crimes known to law and will inevitably attract a lengthy penitentiary term because of the extremely high level of moral blameworthiness of the *mens rea* component of attempted murder. Subject to the harm or consequence of the *actus reus* the ultimate sentence will not depend on that factor alone. At paragraphs 14 to 16 he states:

> 14. Attempted murder is one of most serious offences known to our law. Historically, the Courts have often imposed sentences for attempted murder that are more severe than cases of manslaughter. This is due to the singular importance that the law ascribes to a person's intention to kill another human being. This point was emphasized by Chief Justice Lamer in *Regina v. Logan* (1990), 58 C.C.C. (3d) 391 (S.C.C.), a case that concerned the constitutionality of the fault requirement for attempted murder. In justifying the requirement of a subjective

> standard, comparable to that required for murder (see *Regina v. Martineau*, [1990] 2 S.C.R. 633), the Chief Justice stated at pp. 399-400:
>
> Quite simply, an attempted murderer is, if caught and convicted, a "lucky murderer".
>
> The stigma associated with a conviction for attempted murder is the same as it is for murder. Such a conviction reveals that although no death ensued from the actions of the accused, the intent to kill was still present in his or her mind. The attempted murderer is no less a killer than a murderer: he may be lucky -- the ambulance arrived early, or some other fortuitous circumstance -- but he still has the same killer instinct. Secondly, while a conviction for attempted murder does not automatically result in a life sentence, the offence is punishable by life and the usual penalty is very severe.
>
> 15. More recently, and in the context of sentencing, Doherty J.A. expressed a similar view in *Regina v. McArthur* (2004), 182 C.C.C. (3d) 230 (Ont. C.A.), at p. 241:
>
> > Under our law, a person can only be convicted of attempted murder if he or she intended to kill. The moral culpability of the attempted murderer is at least equal to that of a murderer. He or she avoids a murder conviction and the automatic sentence of life imprisonment not because of any mitigating factor, but because through good fortune, the victim was not killed:
> >
> > A conviction for attempted murder will almost inevitably result in a lengthy penitentiary term.
>
> 16. Even with this prescription in mind, there is still a wide range of sentences for attempted murder. The intent to kill is the only fixed value in these cases; there are many other variables that must be considered in determining the appropriate sentence. Attempted murder cases span from those where no injury is caused to the victim (*i.e.*, the bullet that misses the target or the gun that malfunctions), to those where the injuries are grave and long lasting. For instance, see the shocking case of *Regina v. MD.*, [2005] O.J. No. 2541 (S.C.J.), in which both of the victim's hands were severed by a machete. Similarly, some attempted murder cases follow complex planning and deliberation (see *Regina v. Denkers* (1994), 69 O.A.C. 391 and *Regina v. Schroeder*, [2004] O.J. No. 6231 (S.C.J.)), while others are more impulsive.

[49] It should be noted that in *Ljeskovica* Trotter J. imposed a sentence of eight years in circumstances where the victim was wounded with a knife during an argument, was hospitalized for days and made virtually a complete recovery.

[50] The defence in its submission accepts that attempted murder while using a firearm will in the vast majority of cases attract a penitentiary sentence given the seriousness of the offence but submits that in the unique circumstances of this case the moral blameworthiness of Officer Forcillo is very low and that the consequence to Mr. Yatim was minimal.

[51] With respect to the issue of moral blameworthiness the defence submits that his moral responsibility lies at the lowest end of the spectrum. As outlined above the position of the defence is that Officer Forcillo was justified in commencing to fire the second volley based on his mistaken but reasonable belief that Mr. Yatim constituted an imminent threat. According to the defence the conviction is based on the theory that at some point in time as he continued to fire the second volley Officer Forcillo made a serious error of judgments. He should have recognized that Mr. Yatim was no longer an imminent threat and that accordingly, his continued firing of the second volley was unlawful because it was excessive. I have found beyond a reasonable doubt that no misperception occurred. Accordingly, on the facts of this case there is no subjective or objective basis to support Officer Forcillo's belief that Mr. Yatim was an imminent threat. Rather by rearming himself Mr. Yatim became only a potential threat. Officer Forcillo knew from his training that he was not allowed to shoot in circumstances of a potential threat. It follows that in my view the shooting of Mr. Yatim was unnecessary and unreasonable and excessive from the outset of the second volley.

[52] Officer Forcillo was trained that the fundamental principle in the execution of his duties as a police officer and in particular in the use of his firearm was the preservation of life which included his own, that of the members of the public and also that of the perpetrator. In that context the use of deadly force was to be the means of last resort to be exercised only in the face

of the imminent threat of death or grievous bodily harm. While it must be recognized that the distinction between potential threat and imminent threat may be blurred by fear, panic or stress inherent in critical situations that is not what occurred in this case.

[53] This is rather a case where contrary to his training, Officer Forcillo shot Mr. Yatim who was only a potential threat. In my view, the precipitous shooting of Mr. Yatim contrary to Officer Forcillo's training constitutes a fundamental failure to understand his duty to preserve all life and not just his own. While the conduct Officer Forcillo does not rise to the level of moral blameworthiness for conduct that is malicious or planned and deliberate, or in furtherance of other criminal activity, his conduct leading to his conviction on Count 2 coupled with the intent to kill constitutes a high level of moral blameworthiness.

[54] The defence also submits that the gravity of the offence is significantly attenuated by the unique circumstances surrounding the consequences to Mr. Yatim of the shooting.

[55] The defence submits that the consequences or harm to Mr. Yatim were minimal for essentially two reasons. First, it is submitted that notwithstanding that the shots to Mr. Yatim's genital organs, his bladder and abdominal area caused serious injury that would have required surgery to preserve life, the injuries did not accelerate or contribute to his death because death was both inevitable and rapid as a result of the first volley of shots.

[56] In my view this submission is irrelevant to sentencing with respect to the second volley. Death was caused by the first volley. That the injuries did not contribute to the death is no reflection on the nature or seriousness of the injuries but simply reflect the medical opinion that

death was inevitable as a result of the devastating injuries suffered by Mr. Yatim in the first volley.

[57] Similarly, that the injuries did not accelerate the death caused by the first volley does not reflect on the nature and seriousness of the injuries but speak only to the fact that the second volley played no role in the cause of death.

[58] Secondly, it is submitted that notwithstanding the seriousness of the injuries, because Mr. Yatim was paralyzed from the waist down, there was no actual harm to Mr. Yatim as there was no measureable impact on his well-being as he did not suffer any pain when hit nor into the future.

[59] I agree that a sentence for attempted murder may vary in length along a spectrum which focuses on the nature and duration of actual harm as opposed to intended harm.

[60] The fact that even though conscious Mr. Yatim could not feel the impact of the second volley or endure long term consequences does not remove the concept of harm from consideration in sentencing in the circumstances of this case. Mr. Yatim retained very serious injuries as a result of the second volley and accordingly there was in fact serious actual harm. That Mr. Yatim did not feel the impact of the bullets nor endured serious surgical intervention is due solely to the fortuitous circumstance that the first volley rendered him a paraplegic and resulted in his rapid death. But for fortuitous circumstances, the injuries to Mr. Yatim would have been a very significant factor in assessing the gravity of the offence and would tend to require a sentence at the higher end of the appropriate range. In my view, it is nevertheless permissible to assign some weight to the serious injuries suffered by Mr. Yatim in considering

the gravity of the offence. This is not a case where the accused intended to kill the victim by firing six shots and missed. As noted by Simmons J.A. in *R. v. Boucher* (2004), 186 C.C.C. (3d) 479 at paragraph 23:

> [23] First, while it is true that the complainant did not suffer any physical injuries, in the context of an attempted murder, the absence of physical injuries is a function of chance and does not necessarily justify a significant reduction in the range of sentence that is otherwise appropriate;

[61] I turn now to a consideration of the offender.

[62] The personal characteristics of Officer Forcillo are very positive and must be viewed as a significant mitigating factor. He has pursued his goal to become a police officer with determination and has overcome obstacles relating to his personal care of his parents and economic circumstances to attain his goal. He was a police officer for three and one half years at the time of the offence. That he will probably lose his job if the conviction is upheld is a mitigating factor. The character reference letters describe him as a family man devoted to his wife and daughters. He is described by his relatives, neighbours and friends as thoughtful, caring, prepared to assist others and not prone to violent behaviour. He has no criminal record. While the offence occurred during the execution of his duties as a police officer neither the Crown nor the defence introduced evidence as the personal characteristics which Officer Forcillo brought to bear in the execution of those duties. There is evidence on the record that Officer Forcillo has drawn his firearm 12 times in the course of his three and one half year career as a police officer in circumstances where confronted with a prohibited weapon. This is the first time Officer Forcillo has had occasion to fire his firearm as compliance was achieved on the other occasions. There is no evidence on the record as to the nature of any communications that produced compliance on those occasions.

[63] The defence submits that the effect of any sentence of incarceration will be more severe for Officer Forcillo as he will be required to serve his sentence in protective custody with its attendant restrictions. Protective custody for police officers has been recognized by the courts as a mitigating factor. I agree. In *R. v. Cook* (2010), ONSC 5016 at paragraph 43 Hill J. stated:

> Because an inmate who is known to be, or discoverable as, a former police officer is at risk from general population prisoners, such an offender will almost inevitably serve much or all of the sentence in protective custody. This reality, involving as it does more limited social contact and institutional amenities, ordinarily warrants consideration in mitigation of punishment.

[64] The defence does not seek a discount based on a formula such as for pre-trial custody but a recognition by this court that time spent in custody for Officer Forcillo will be more difficult than for the ordinary inmate.

[65] In considering the principles of sentence it is imperative that the court strike the appropriate balance. In this task I asserted by the guidance provided by LeBell J. in *R. v. Nasogaluak* 2010 S.C.C. 6 where at paragraph 43 he stated the following:

> **43** The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S:C.R. 309; *M. (C.A.); R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance [page233] of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.

[66] Defence counsel remind me that the gravity of the offence is related to the objective of denunciation and "promotes justice for victims and ensures public confidence in the justice

system" while the focus on the attributes of the offender "serve a limiting or restraining function and ensure justice for the offender".

[67] The defence candidly submits that generally the cases which deal with sentencing for the offence of attempted murder emphasize the principles of denunciation and deterrence but that this is the unique case where rehabilitation should be the governing principle based on his submission with respect to Officer Forcillo's positive personal characteristics and his low moral culpability. While I accept that that the personal characteristics of Officer Forcillo constitute a mitigating factor, I have outlined my reasons why I respectfully disagree that the moral culpability of Officer Forcillo is at a low level. In my view, the governing principles sentencing in this case are denunciation and deterrence. In my view Officer Forcillo does not require rehabilitation given his personal characteristics and antecedents.

[68] At this juncture I wish to deal with two submissions made by defence counsel with respect to the role of general and specific deterrence in this case.

[69] The defence submits that it is not the quantum of sentence imposed on Officer Forcillo which will convey the message of general deterrence to other police officers but it is the prospect of being charged and the loss of employment if he fails lawfully to discharge his firearm. While there is some force to this submission, in my view the quantum of sentence will also serve to emphasize to other officers in executing their duties with respect to the discharge of their firearms that they do so only as a last resort in accordance with their training and only if justified within the provisions of ss.25 and 34 of the *Criminal Code* and not as their first and only option.

[70] In my view, the goal of sentence in this case should be to denounce and punish Officer Forcillo's conduct and thereby to promote a sense of responsibility for the offence of attempted murder and reflect the community's denunciation of that crime.

[71] The defence submits that this is not a case in which the quantum of sentence should be influenced by considerations of specific deterrence. It is submitted that in the circumstances of this case the goal of specific deterrence has already been achieved in view of immense and negative publicity with respect to the role of Officer Forcillo in the incident, the evidence at trial and his conviction. I agree that it is not necessary to assign any weight to specific deterrence in this case and that the exceptional level of publicity as it affects Officer Forcillo should be considered in assessing the weight to be given to his personal circumstances.

[72] In support of its position that a sentence in the range of eight to ten years is a fit sentence in the circumstances of this case the Crown relies on *Regina v. Tan* (2008) O.A.C. 385 in which the Court of Appeal stated that the range of sentence for attempted murder is one of six years to life. The Crown has reviewed some 50 cases in support of that range. The defence, in support of its submission that a fit sentence in the circumstances of this case is a conditional sentence of two years less one day submits that while the range of sentence for attempted murder is one of three years to life it has nevertheless adduced several cases of exceptional circumstances in which lower sentences have been imposed. I do not intend to engage in a detailed review of all of these authorities as I agree with defence counsel that neither the authorities of the Crown nor indeed those adduced by the defence are factually comparable to this case and accordingly do not for the most part offer any real precedent for the case at bar. Accordingly, it is not useful to review these cases to establish parity.

[73] I only wish to make some general comments with respect to the authorities tendered by counsel. The rare cases tendered by the defence which fall at or slightly below a sentence of three years involving attempted murder using firearms are largely driven by the presence of serious mental health issues or emotional disturbance in a domestic context which is not present in this case. The cases tendered by the Crown to justify a sentence of eight years or higher are driven by the presence of one or more of the following aggravating factors: planning, a clear motivation to kill such as malice or anger, serious criminal antecedents, circumstances where the attempted murder occurred in circumstances of the furtherance of other serious crimes and where the attempted murder resulted in serious long lasting psychological or physical injury. With the exception of physical injury albeit not long lasting, none of the above factors are present and accordingly I agree with the defence that the eight to ten year range proposed by the Crown is inappropriate based on the authorities adduced by the Crown.

[74] In my view of all the cases cited by both counsel the only case which is useful in adhering to the principle of parity in sentencing, namely, that a "sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances, is the decision of the Supreme Court in *R. v. Ferguson, supra.* In my view, an examination of the facts and sentence imposed in *Ferguson* assists in establishing an approximate range for the offence in this case and a comparison of the aggravating and mitigating factors in *Ferguson* with those of this case assists in determining the appropriate sentence in that range. I wish to clarify however that I do not consider the four year mandatory minimum as a take-off point in considering the range or quantum of sentence as the sentence in this case must be determined by applying the

principles of sentence to the facts of this case having regard to the aggravating and mitigating factors.

[75] In *Ferguson, supra,* as in this case a police officer was charged with second degree murder while in the execution of his duty as a police officer. After trial Ferguson was convicted of the lesser and included offence of manslaughter and sentenced to a conditional sentence of two years less a day notwithstanding the mandatory minimum sentence of four years mandated by s.236(a) of the *Criminal Code* for use of a firearm in the commission of the offence of manslaughter. However, the Supreme Court concluded that on the basis of the facts of that case the mandatory minimum sentence of four years did not amount to cruel and unusual punishment under s.l2 of the *Charter*. Those facts can be summarized as follows. After arresting the deceased, Officer Ferguson escorted him into the cells. He testified that the deceased attacked him when he entered the cell pulling his bulletproof vest over his head and face and grabbing his firearm from his holster. Officer Ferguson fired twice. The first shot wounded the deceased in the stomach. After approximately three seconds elapsed the second shot struck the deceased in the head causing his death. Officer Ferguson testified at trial that when both shots went off they were both struggling for the gun. However, in an earlier statement Officer Ferguson said he had acquired control of the gun when each of the shots were fired. This statement was accepted by the trial judge for sentencing purposes.

[76] The Supreme Court found that the trial judge had properly concluded that in order to reach its verdict the jury must have rejected self-defence and the intent for murder. However, in imposing sentence the trial judge went on to find that the first shot had been in self-defence and then inferred from that finding that the second shot had been instinctive and a product of his

training. The Supreme Court rejected these findings as they were inconsistent with the jury's verdict and also speculative as they were not supported by the evidence, As these unwarranted findings formed the basis of the trial judge's conclusions that the mandatory minimum sentence was inappropriate, the Supreme Court found that once the findings were set aside there was no basis to conclude that the mandatory minimum punishment was inappropriate. At paragraph 28 the Chief Justice expressed her conclusions as follows:

> 28. ...The trial judge recognized as *aggravating factors* that Constable Ferguson was *well trained in the use of firearms and stood in a position of trust* with respect to Mr. Varley, and correctly noted that the standard of care was higher than would be expected of a normal citizen. *By way of mitigation,* the trial judge noted that Constable *Ferguson's actions were not planned, that Mr. Varley initiated the altercation in the cell, that Constable Ferguson had little time to consider his response, and that his instincts and training played a role in the shooting. The mitigating factors are insufficient to make a four-year sentence grossly disproportionate.* The absence of planning, the apparent fact that Mr. Varley initiated the altercation in the cell, and the fact that Constable Ferguson did not have much time to consider his response, *are more than offset by the position of trust Constable Ferguson held and by the fact that he had been trained to respond appropriately to the common situation of resistance by a detained person. I agree with the Court of Appeal that the mitigating factors do not reduce Constable Ferguson's moral culpability to the extent that the mandatory minimum sentence is grossly disproportionate in his case.*

[77] The defence submits that on a close reading *Ferguson* is not helpful, in establishing either an appropriate range of sentence, or an appropriate quantum of sentence with respect to the circumstances of this case, as it is distinguishable on a number of significant points.

[78] First, it is submitted that because, Officer Ferguson caused death the gravity of his crime is far greater than that of Officer Forcillo notwithstanding that Mr. Yatim suffered very serious wounds as a result of the second volley. The defence acknowledges that the gravity of the offence is generally measured by the moral blameworthiness of the intent of the perpetrator in combination with the harm which results from consequences of his conduct.

[79] While death no doubt is the most serious consequence, in this case the injuries suffered by Mr. Yatim constituted actual serious harm which would have required major surgical intervention and cannot be dismissed either because they were not felt or because they did not endure as a fortunate result of the consequences of Officer Forcillo's first volley.

[80] On the other hand, the moral blameworthiness of the specific intent to kill given the jury's rejection of justification and self-defence pursuant to ss.25 and 34(2) of the *Criminal Code* respectively constitute the highest level of moral culpability under the criminal law as compared to the intent for manslaughter. In my view, on balance the gravity of the offence is at a considerably higher level than that in *Ferguson*.

[81] The defence submit that it is significant that in *Ferguson* the deceased was unarmed and that Officer Ferguson had full control over his weapon. In this case it is submitted that prior to and during second volley Mr. Yatim had rearmed himself with a knife and remained at least a potential threat throughout the second volley. It must be recalled that in *Ferguson* the deceased was involved in an active physical struggle with Officer Ferguson who was alone with him in the cell, whereas in this case Mr. Yatim was lying on the ground visibly wounded by at least one shot and that Officer Forcillo was backed up by a number of officers one of whom was armed. Moreover, by virtue of his training Officer Forcillo knew that he could not shoot Mr. Yatim if he was only a potential threat.

[82] The defence would seek to draw an analogy between the first and second shot in *Ferguson* to the first and second volley in this case. It is submitted that as the jury must have found that Officer Forcillo fired the first volley in self-defence consistent with the acquittal for murder it is available to infer that that mindset continued into the second volley despite the six

second interval at least to the extent of the initial shots in the second volley. In my view that theory is not consistent with the facts. In the first volley it was the position of Officer Forcillo that he shot Mr. Yatim on the basis that he was an imminent threat based on his aggressive behaviour and facial features coupled with the fact that he advanced toward him despite a warning that he would be shot if he did so and continued to advance despite being told to drop the knife and not to move. The decision to commence the second volley was taken on an entirely different basis in the interval of six seconds after Officer Forcillo assessed the conduct of Mr. Yatim as he was lying wounded on the floor of the streetcar. Officer Forcillo testified that he formed his decision to shoot on the basis that he was an imminent threat as he observed Mr. Yatim rearm himself and that he misperceived Mr. Yatim to begin to rise to continue the attack. As I have found that Officer Forcillo did not misperceive Mr. Yatim to begin to rise, there was no evidentiary basis for Officer Forcillo to consider Mr. Yatim an imminent threat nor any justification for Officer Forcillo to fire any of the rounds of the second volley in mistaken self-defence.

[83] Finally, the defence submits that if the court determines *Ferguson* to be an applicable precedent that at the very least the facts in *Ferguson* undermine the Crown's position that a sentence of eight to ten years be imposed with respect to the facts of this case but supports the defence position that a sentence of five years be imposed.

[84] The Crown submits that it is significant that the court in *Ferguson* did not advert to the factor identified in *R. v. Morrisey* by Arbour J. in dissent, namely, that police officers are obliged to engage persons who commit crimes and to carry restricted weapons and hollow point bullets as a factor in mitigation. I agree with the submission of the Crown. While in certain

circumstances the appropriation of a firearm by a member of the public may be an aggravating factor, the improper and unlawful use of a firearm was recognized as an aggravating factor by the trial judge in *Ferguson* and affirmed by the Supreme Court on the basis that police officers are well trained in the appropriate and lawful use of firearms and stood in a position of trust. The issue is not that police officers are provided with a firearm but whether they properly employ it pursuant to their training. In my view the unlawful use of the firearm in the face of his training is a significant aggravating factor as his training was crystal clear that the firearm be used only as a last resort to repel an imminent threat which I have found did not obtain in this case.

[85] The Crown submits that *Ferguson* posits that breach of trust is also a very significant factor in assessing the quantum of sentence.

[86] The Crown submits that this case involves a grave breach of trust in which lethal force was used repeatedly against a person who was not an imminent threat. I agree that such abuse of authority undermines the public's confidence in the integrity and professionalism of the police and ultimately in our system of justice and is a significant aggravating factor. This point was firmly made in *Regina v. Schertzer* (2015), 325 C.C.C. (3d) 202 (Ont. C.A.) at paragraphs 133 and 136:

> 133. Police officers are sworn to uphold the law. In *R. v. Feeney*, 2008 ONCA 756, 238 C.C.C. (3d) 49, at para. 8, this court endorsed the following passage from *R. v. Cusack* (1978), 41 C.C.C. (2d) 289 (N.S. S.C.(A.D.)):
>
> > [T]he paramount consideration in this case is the protection of the public from offences of this sort being committed by persons who are given special authority by our law to deal with individual members of society, and to deter such persons from acting in breach of their trust ...
> >
> > The commission of offences by police officers has been considered on numerous occasions by the Courts, *and the unanimous finding has been*

> *that their sentence should be more severe than that of an ordinary person who commits the same crime*, because of the position of public trust which they held at the time of the offence and their knowledge of the consequences of its perpetration... [emphasis added]
>
> 136. When the perpetrators of the crime are police officers sworn to uphold the law, the objective of denunciation has heightened significance. Police officers owe a special duty to be faithful to the justice system.

[87] The Crown submits that as in *Ferguson* the standard of care for Officer Forcillo was higher than would be expected of a normal citizen and that he failed to respond appropriately although trained to do so with respect to the common situation of resistance to arrest. I agree with this submission. Not only did Officer Forcillo fail to follow his training in shooting Mr. Yatim with the second volley in circumstances where he was only a potential threat as I have found, but, given that Mr. Yatim was only a potential threat it was available for Officer Forcillo to engage in verbal de-escalation as an alternative response to the use of lethal force or at a minimum to engage in some form of communication in order to persuade Mr. Yatim to surrender his weapon as he was trained to do. In my view, Officer Forcillo failed in his duty to Mr. Yatim as he did not give him an opportunity to comply with a request that Mr. Yatim surrender his weapon. These alternatives to lethal force were not available to Officer Ferguson.

[88] In *Ferguson* the Chief Justice considered that the short length of time for Officer Ferguson to consider his response to the victim's conduct was a mitigating factor. In this case, however, the length of time to respond was determined not by the conduct of Mr. Yatim but by Officer Forcillo's assessment that Mr. Yatim was an imminent threat contrary to his training, as I have sought to explain.

[89] As to the other mitigating factors identified by the Chief Justice in *Ferguson* I agree that there is an absence of planning, and the fact that Mr. Yatim initiated the incident must be considered in mitigation.

[90] I find, as did the Chief Justice in *Ferguson*, that the aggravating factors substantially outweigh the mitigating factors in this case. I find that Officer Forcillo prior to the second volley although well trained in the appropriate use of his firearm failed to follow his training in determining that Mr. Yatim constituted an imminent threat and accordingly misused his firearm. I also find as an aggravating factor that Officer Forcillo failed to follow his training in adopting available alternatives to the use of lethal force such as verbal de-escalation or engaging in communications so as to prompt Mr. Yatim to surrender his weapon. I also find as an aggravating factor that the shooting of Mr. Yatim in the circumstances constitutes an egregious breach of trust.

[91] In addition to the high level of moral culpability that ensues from the specific intent to kill in circumstances where the shooting is unjustified, unnecessary, unreasonable and excessive, I find several aggravating factors.

[92] I find that Officer Forcillo prior to the second volley failed to follow his training in determining that Mr. Yatim constituted an imminent threat and accordingly chose to use his firearm contrary to his training. I also find that he failed to follow his training in adopting available alternatives to lethal force such as de-escalation or engaging in communication so as to prompt Mr. Yatim to surrender his weapon. I find that the shooting of Mr. Yatim in the circumstances constitutes an egregious breach of trust which is an aggravating factor.

[93] By way of mitigation I take into account the fact that Mr. Yatim was responsible for commencing the incident by his unlawful behaviour requiring Officer Forcillo to respond as he was required to do. I also take into account that this is not a case of planning, oblique motive or malice. I also take into account the very positive personal characteristics of Officer Forcillo which have been outlined both in the evidence and in the letters submitted to the Court and the impact of protective custody and the probable loss of employment by way of mitigation.

[94] I have also heard from Mr. Yatim's mother, father and sister by way of victim impact statements. I have considered these statements in imposing sentence although I realize that no sentence which I impose or anything I can say can compensate for the deep sense of loss and grief which has been expressed by them in these statements. I sincerely wish, however, that with the imposition of sentence they will find some closure with respect to this tragic event.

[95] I wish to emphasize that the sentence I am about to impose should not be taken to reflect adversely on the well-deserved reputation of the Toronto Police Service as a whole nor to diminish in any way the respect and support that individual police officers deserve for the dangerous and important work they do and the professionalism with which they generally discharge their responsibilities. However, when a police officer has committed a serious crime of violence by breaking the law which the officer is sworn to uphold it is the duty of the court to firmly denounce that conduct in an effort to repair and to affirm the trust that must exist between the community and the police to whom we entrust the use of lethal weapons within the limits prescribed by the criminal law.

[96] Officer Forcillo Please Stand –

You have been convicted by a jury of your peers of attempted murder which is one of the most serious offences known to our law. In imposing sentence I have considered the facts of this case and applied the purpose and principles of sentencing to those facts. I have considered both the aggravating and mitigating factors that apply to this case and have determined that the aggravating factors outweigh the mitigating factors by a significant margin. I conclude that in the circumstances of this case the appropriate sentence is one of six years in the penitentiary.

THEN J.

RELEASED: July 28, 2016

CITATION: R. v. Forcillo, 2016 ONSC 4850
COURT FILE NO.: CR-14-10000434-0000
DATE: 20160728

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

– and –

JAMES FORCILLO

Applicant

REASONS FOR SENTENCE

THEN J.

RELEASED: July 28, 2016