

Forcillo appeal decision doesn't alter law around police force



By [Jacob Stilman](#)

On July 27, 2013, Const. James Forcillo of the Toronto Police confronted Sammy Yatim, who was armed with a knife, yelling in a threatening manner, while standing alone inside an immobile streetcar. Forcillo shot Yatim three times, striking him in the heart and severing his spine with two of the shots. Yatim fell to the floor of the streetcar mortally wounded. But Forcillo was not done. He paused for 5.5 seconds and then shot Mr. Yatim six more times.

On April 23, 2018, Const. Ken Lam confronted a suspect, who had allegedly just driven his rental van down Yonge Street, targeting as many innocent pedestrians as he could, striking more than 20 individuals and killing 10. In the immediate aftermath of the carnage, the world witnessed one of the most remarkable displays of police restraint and control ever seen, as Lam, with the suspect gesturing at him in a highly threatening manner with an apparent weapon, de-escalated the situation and refused to fire his weapon. Lam then effected a peaceful arrest using minimal force.

One week after the dramatic events unfolded on Yonge St., the Ontario Court of Appeal released its judgment in the Forcillo shooting case, upholding the conviction for attempted murder. While undoubtedly a coincidence of timing, there is an irony to the outcome of the appeal, which involved the flagrant excessive force by one police officer, as contrasted with the calm restraint of another.

Still, the public should not look to the Forcillo case as ushering in new legal awakening on the issue of excessive or unwarranted lethal force by the police. The appeal does not represent a departure from well-established principles regarding the use of force, and implicitly shows deference to a police officer's judgment where the officer perceives a threat to his or the public's safety. Thus, there is no questioning or review of Forcillo's actual decision to shoot Yatim less than one minute into his encounter with him.

The court does not dispute the officer's resort to either s. 25 (the law enforcement provision in the Criminal Code that excuses lethal force in the lawful execution of a police officer's duty) or s. 34 (self-defence and of the same law), even though Yatim was armed only with a knife, and not a firearm. Nor did the court call into question Forcillo's perception that he was at risk, even though Yatim was on an empty streetcar, and could not have attacked anyone without first descending the steps and exiting onto the street.

The court also did not consider the reasonableness of the officer's actions in not awaiting the arrival of alternative non-lethal equipment such as the Taser, which was indeed on its way. Lastly, the court did not examine the larger issue of the police failure to de-escalate an encounter with an obviously mentally disturbed subject, an issue that has led to far too many tragic police-caused deaths.

The Court of Appeal did not pronounce on these issues for a very simple reason: they were not germane to the appeal. Forcillo was acquitted of the murder charge, and the Crown did not cross-appeal that part of the verdict. Thus, the court only had to consider the legal issues that arose out of the conviction for attempted murder, which was under appeal by the defence.

In this regard, the court addressed a largely factual question: the significance of the 5.5-second delay between the first series of shots, which undoubtedly killed Yatim and the jury found to be justified under ss. 25 and/or 34 of the Criminal Code, and the second volley of shots that Forcillo fired into Yatim after he was clearly down and no longer even remotely a threat.

The Crown, in particularizing the two series of shots as distinct events, was able to prove beyond a reasonable doubt that Forcillo's second act of firing had no legal justification, and thus constituted the offence of attempted murder. The defence appeal largely focused on the propriety of this legal manoeuvre by the Crown. While it may seem counter-intuitive that a person can be convicted of attempting to murder a person who he has already killed, the legal reasoning in this decision is sound. The appeal court reduced this question to a simple formula in its decision:

"Was there a basis in the evidence upon which a properly instructed jury could reasonably draw distinctions between the circumstances in which the first volley was fired and the circumstances in which the second volley was fired so as to warrant a finding that the Crown had failed to prove beyond a reasonable doubt that the first volley was not justified, but had proved beyond a reasonable doubt that the second volley was not justified?"

The court resolved this reasoning as follows:

"There were obvious differences between the circumstances as they existed when the appellant fired the first volley, and the circumstances as they existed when he fired the second volley. Those differences could reasonably have led the jury to come to different conclusions as to what the appellant perceived when he opened fire.

"The jury was entitled to reject the appellant's evidence that he thought Mr. Yatim was getting up when he fired six shots at Mr. Yatim from ten feet away. If the jury rejected that evidence and instead concluded that when the appellant opened fire, he saw Mr. Yatim lying on his back on the streetcar floor, just as the video surveillance showed, the jury would have little difficulty concluding that Mr. Yatim posed no imminent threat to the appellant and the appellant knew it. If the jury came to those factual conclusions, the appellant's justification defences could not succeed on count two."

The Forcillo conviction and appeal will provide some satisfaction to those who have long held that in cases of excessive force police officers have too often been held unaccountable. However, given the unique facts of this case, which dictated its unusual result, the decision does not alter the law of police use of force. It will not, in and of itself, send a message to police forces that they need to recalibrate their approach in violent encounters with the mentally ill or resort to less lethal means as a rule.

While police forces do seem to be addressing this issue on their own, in the wake of the bad publicity that has increasingly arisen from video evidence in the cellphone era, the courts will likely continue to take a hands-off approach to police decision-making, unless the evidence of abuse is overwhelming. Perhaps, though, the brave actions of Lam, which were compellingly demonstrative of how police can be effective in defusing a violent confrontation, will result in a rethink of police conduct in the future.

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