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Date: 2004-12-10

Docket: 05547997Q1

[\[Noteup\]](#) [\[Cited Decisions and Legislation\]](#)

Court of Queen's Bench of Alberta

Citation: *R. v. Ferguson*, 2004 ABQB 928

Date: 20041210

Docket: 05547997Q1

Registry: Lethbridge/Macleod

Between:

Her Majesty the Queen

- and -

Michael Esty Ferguson

**Reasons for Judgment
of the
Honourable Mr. Justice G.C. Hawco**

[1] Michael Ferguson was found guilty of manslaughter by a jury following a four week trial. He had been charged with and tried for the murder of Darren Varley, as a result of the fatal shooting of Mr. Varley on October 3, 1999. The jury found Mr. Ferguson not guilty of murder.

[2] At the time of the shooting, Mr. Ferguson was an on-duty member of the Royal Canadian Mounted Police. Mr. Varley was in his custody and was being placed in the police cells in the Town of Pincher Creek, Alberta.

[3] On October 26, 2004, I determined that the facts which the jury must have relied upon in order to reach its verdict in this case were these:

1. Mr. Varley was highly excited and agitated at the Pincher Creek Hospital, where he was taken into custody following an altercation with Mr. Ferguson, while in the police vehicle, and later at the detachment.
2. Mr. Varley was consumed with fear about his fiancé who had gone missing. He did not want to be in jail.
3. Mr. Varley tried to get past Mr. Ferguson in the cell and assaulted Mr. Ferguson in the process.
4. Mr. Varley was able to get control of Mr. Ferguson's gun, which was in Mr. Ferguson's service holster, and had pulled the gun out of the holster.
5. Mr. Ferguson was able to regain control of the gun and fired two shots at Mr. Varley.
6. Since the jury found that Mr. Ferguson was not acting in self-defence when he fired the second shot, but also found he did not have the intent to cause death or grievous bodily harm to Mr. Varley, the jury must have determined that there was some justification for firing the first shot. As I stated at that time, I was and am satisfied that the justification was that Mr. Ferguson honestly believed, at the time that he fired the first shot, that he himself was in danger of death or grievous bodily harm. He was at the time of the first shot, acting in self-defence.
7. In order for the jury to have convicted Mr. Ferguson of manslaughter, they must have concluded that after the first shot had been fired, which struck Mr. Varley in the abdomen, Mr. Ferguson did not have the same fear of death.
8. As there was not the same fear of death, there was then no need to fire the second shot.
9. Having found that there was no intent to cause death or grievous bodily harm, the jury must have concluded that the second shot was not a deliberate shot to the head, but was simply a shot fired unnecessarily, in close quarters, and which could or would be in the normal course of events, dangerous. That second shot was something which had been instilled in Mr. Ferguson through all of his fire arms training, both with the RCMP and other approved agencies. In this instance, his training led him to fire a second shot which the jury found to be unnecessary. It caused him the conviction of manslaughter. Tragically, it also cost Mr. Varley his life.

10. With respect to the altercation at the Hospital referred to above, I have found that it was not sufficiently serious to give rise to what subsequently occurred. Mr. Varley was very agitated, aggressive and loud. He was obviously intoxicated, but not incapacitated. I do not say this in a negative or derogatory sense. Mr. Varley was extremely distraught about his missing fiancé. But it is an important element in what transpired in the police cells. According to Mr. Langille, a Security Personnel on duty at the Hospital, after the altercation Mr. Ferguson was pretty calm. Mr. Langille believed that he had been just doing his job.
11. I concluded that there was not a simmering anger on Mr. Ferguson's part which may have been a factor in the shooting of Mr. Varley as a result of the altercation at the Hospital, or the fact that Mr. Varley kicked out the police car window. The shooting occurred because of a number of unfortunate circumstances: Mr. Varley's concern for his fiancé; Mr. Varley's determination not to remain in jail; a further altercation at the jail; a struggle for a loaded gun; a serious threat; instinct, training and a failure to fully appreciate the consequences of firing the second shot.

[4] Mr. Ferguson must now be sentenced for this offence.

[5] I have considered the submissions of counsel and have considered the victim impact statements. I am very aware of the grief and anger of the Varley family. I know what it is to lose a 23 year old son. No sentence that I can impose today will alleviate their grief. Their anger may never be mollified. Our Courts cannot become involved in retribution and vengeance. Rather, I am obliged by law to render a sentence which is proportionate to the gravity of the offence and the degree of responsibility of the offender. That is what I shall attempt to do today.

[6] Pursuant to Section [236 \(a\)](#) of the *Criminal Code*, every person who commits manslaughter is guilty of an indictable offence and liable, where a firearm is used in the commission of the offence, to a minimum punishment of imprisonment for a term of four years. The Crown seeks a penalty of greater than six years. The defence seeks a declaration that the imposition of the mandatory minimum four-year sentence would subject Mr. Ferguson to cruel and unusual punishment contrary to Section 12 of the *Charter of Rights*. To remedy such a violation or infringement of his rights, Mr. Ferguson seeks a "constitutional exemption" from the application of Section [236\(a\)](#) of the *Criminal Code*.

[7] The Crown has argued that a Court has never granted such a remedy in such a case and that I should not do so now. Mr. Saull has cited *R v. Seaboyer*, [1991 CanLII 76 \(S.C.C.\)](#), [1991] 2 SCR 577 as authority for this argument. That case stands, he says, for the principle that to allow constitutional amendments would permit judicial discretion where Parliament had intended that there be none. With respect, I do not read Madam Justice McLachlin's reasons in the same light. At page 627 of the decision, she says, speaking for the majority, that she leaves aside the question of whether it is open to the Court to declare a certain section valid in part by techniques such as reading down and constitutional exemptions.

[8] Eleven years later, the Supreme Court of Canada in *R v. Morrissey*, [2002] 2 SCR 90, considered whether the four-year minimum sentence provided for in a similar section of the *Code* (Section 220(a), criminal negligence causing death), violated Section 12 of the *Charter of Rights* as being cruel and unusual punishment. The trial judge had found that the four-year minimum sentence did violate Section 12 of the *Charter of Rights* and sentenced the accused to two years imprisonment. The Nova Scotia Court of Appeal imposed a four-year sentence. The Supreme Court of Canada upheld the four-year sentence. Speaking for the majority, Mr. Justice Gonthier stated, at para. 26:

Section 12 of the *Charter* provides a broad protection to Canadians against punishment which is so excessive as to outrage our society's sense of decency... The Court's inquiry is focussed not only on the purpose of the punishment, but also on its effect on the individual offender. Where a punishment is merely disproportionate, no remedy can be found under s. 12. Rather, the court must be satisfied that punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable.

[9] At para. 27, Justice Gonthier quoted with approval the following statement of Justice Lamer in *R v. Smith*, [1987 CanLII 64 \(S.C.C.\)](#), [1987] 1 SCR 1045:

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.

[10] The majority went on to find that the minimum sentence in that particular case was not cruel and unusual. Although that was sufficient to effectively deal with the matter, Justice Gonthier did consider certain hypothetical situations which had been considered by the trial judge in striking down Section 220(a). These hypotheticals covered two types of situations, the first involving an individual playing around with a gun and the second involving hunting trips gone awry. In both of those hypotheticals, Justice Gonthier was of the view that a four-year imprisonment would not be cruel and unusual punishment for such offenders. In the end result, Justice Gonthier, on behalf of the majority of the Court, found that Section 12 was not infringed. He went on to say, at para. 56:

further, it is unnecessary to consider the availability of constitutional exemptions, especially given the concession by the appellant that the four-year minimum sentence would not be grossly disproportionate for him personally.

[11] In the decision of the minority, Madam Justice Arbour on behalf of herself and Madam Justice McLachlin (as she then was), while agreeing with the result of the decision of the minority envisaged two situations where there might well be a constitutional exemption, one being where an accused might have committed manslaughter as a result of spousal abuse, the other involving police officers.

[12] At para. 82 of *Morrissey* Justice Arbour said:

As I indicated at the outset, I believe that there will unavoidably be a case in which a four-year minimum sentence for this offence will be grossly disproportionate.

[13] At para. 86, having dealt with battered women's syndrome and firearms homicides, she said:

Another type of situation in which the four-year mandatory minimum sentence under s. 220(a) could be found to violate s.12 involves police officers or security guards who are required to carry fire arms as a condition of their employment and who, in the course of their duty, negligently kill someone with their firearm. Of course, the law will hold such persons to a high standard of care in the use and handling of their firearms; however, it is nonetheless conceivable that circumstances could arise in which a four-year penitentiary term could constitute cruel and unusual punishment.

[14] Justice Arbour referred to the case of *R. v. Deane*, [1997] O.J. No. 3578 where a police officer was convicted of criminal negligence causing death when he shot the victim during a confrontation between native protestors and the Provincial police in September of 1995. The trial judge, Judge Fraser, imposed a conditional sentence of two years less a day to be served in the community, under the then recently enacted legislation permitting this kind of disposition. Judge Fraser noted that had the offence occurred in September 1994, a conditional sentence would not have been available to the accused. Similarly had the offence occurred in September 1996, subsequent to the *Firearms Act Amendments*, the accused would have had to face a four-year mandatory minimum precluding the use of a conditional sentence. Justice Arbour then stated:

Interestingly, Fraser Prov. J. queried "whether the legislators considered the fairness of having those accused such as policemen or guards, who have legitimate reasons for possessing a firearm, subject to the same statutory minimum as others who are not required for employment purposes to carry a gun."

[15] Finally, at para. 93 and 94 Justice Arbour says:

In the case of some offences, it is possible for the Courts to decide once and for all, with adequate certainty, whether, and if so when, the mandatory minimum will not be constitutionally acceptable. This was so in some of the previous decisions of this Court. I do not believe that this is one of those cases. In my view, it would be prejudicial to the interest of the hypothetical accused who will wish to demonstrate that four years imprisonment would be grossly unjust if imposed on him or her, to no juris prudential benefit, in the form of certainty or otherwise, if we were simply to uphold the provision for the reasons articulated by my colleague.

In cases of manslaughter involving the use of a firearm and arising from criminal negligence causing death, I believe that the better approach is to read the mandatory minimum as applicable in all cases save those in which it would be unconstitutional to do so.

[16] I appreciate that Justices Arbour and McLachlin were in the minority and that both what they said and what the majority said with respect to constitutional exemptions was dicta - that is, it was not a part of the reasoning required to decide the issue before them. Yet, with the greatest respect Justice Gonthier's hypothetical examples refer to two certain types of hypotheticals "that commonly arise" (para. 51). The hypotheticals to which Justice Arbour refers are hardly "common". She refers

to the “what if” situation in battered women’s syndrome and where a police officer, required to carry a gun, becomes involved in a shooting. It is, in my respectful view, only in such a rare and unique situation that a Court ought seriously give consideration to a constitutional exemption.

[17] The Crown has referred to the decision of the Supreme Court of Canada in *Reference Re: Firearms Act (Canada)* [2000 SCC 31 \(CanLII\)](#), (2000), 144 CCC (3d) 385, wherein the Court highlighted that one of Parliament’s purposes in proposing the *Firearms Act* was to promote public safety through effective sentencing measures. As stated in the headnote to this case, the government’s purpose, as indicated by Parliamentary debates, was to promote public safety. The Act was aimed at evils such as the illegal trade in guns and the link between guns and violent crime, suicide and accidental death. I suspect that the same purpose was the basis for amendment to the [Criminal Code](#) creating a four-year minimum sentence.

[18] With due respect, I do not take the Supreme Court’s reference in para. 20 to “tough measures” to deal with the criminal misuse of firearms and to “the deterrence of the misuse of firearms” to be applicable to police officers who are required by their employer, in this case the Government of Canada, to carry firearms and to become trained in their use.

[19] In *R. v. Latimer*, [2001 SCC 1 \(CanLII\)](#), [2001] 1 S.C.R. 3 the Court confirmed the statement of Justice Lamer referred to above in *Morrissey*, that is, that the Court must consider: “whether the punishment prescribed is so excessive as to outrage standards of decency.” In other words, though the State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would otherwise have been appropriate.

[20] It is important to note that what the Supreme Court is speaking about in these cases is not simply a sentence that might be considered to be unfit, but rather one which would be so unfit as to cause an informed public to be shocked that the courts would impose such a sentence.

[21] As stated by the Court at para. 76 of *Latimer*:

It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the Charter.

[22] In order to determine whether a minimum of four years in jail would be a grossly disproportionate sentence, it is necessary to look to what sentences other courts have imposed for somewhat similar offences in the past.

[23] In *R. v. Ball*, [1993] O.J. No. 3207 a two-year suspended sentence was given when the careless or negligent handling of a firearm led to the death of another.

[24] In *R. v. Owens*, [1986] B.C.J. No. 401 an accused was given a three-year suspended sentence with one thousand hours of community service. He had been carrying a shot gun for purposes of possible self defence in case he was attacked. He slipped and fell, the gun fired and an innocent person died.

[25] In *R. v. Lecaine*, [1990] A.J. No. 360, the Alberta Court of Appeal upheld a sentence of one year where an accused had pulled a gun and shot a person after that person had hit him in the

head and kicked him.

[26] In *R. v. Francis*, [1991] A.J. No. 958, his Honour Judge Fradsham sentenced an accused to twenty months in a situation where the accused had been running from an attacker who caught him. The accused then pulled a knife and stabbed his attacker to death.

[27] *R. v. Deane*, to which I refer above, is, I believe, the closest example to the facts in this case. There, Judge Fraser sentenced the officer to a conditional sentence of two years less a day. The Crown's appeal against sentence was dismissed by the Ontario Court of Appeal.

[28] On the other end of the scale, we have the decision of *R. v. Tallman* [1989 CanLII 174 \(AB C.A.\)](#), (1989), 48 C.C.C. (3d) 81 where our Court of Appeal levied a sentence of six years and eight years in the case of manslaughter involving a gun where two accused had broken into a house in search of the home owner in an attempt to obtain some keys from him to rob a store. During the struggle that ensued, the home owner was killed.

[29] It is quite evident that the range of sentences for manslaughter goes from a low of a suspended or conditional sentence to a high of eight years and even further. In the *Tallman* decision to which I have referred, Chief Justice Laycraft stated that it was impossible to issue a "starting point" for sentences involving manslaughter because the degree of culpability of accused persons may vary so widely from case to case.

[30] In *R. v. Laberge*, [1995] A.J. No. 434, Chief Justice Fraser of our Court of Appeal pointed out that despite common elements in all manslaughter convictions, there was a wide range in reported sentencings. In attempting to bring some order to the sentencing process, the Court ruled that the focus should be upon the degree of moral culpability attached to the particular circumstances before the Court. Chief Justice Fraser stated, at para. 6:

Different degrees of moral culpability attach to each along a continuum within the spectrum. It is precisely because a sentence for manslaughter can range from a suspended sentence up to life imprisonment that the court must determine for sentencing purposes what rung on the moral culpability ladder the offender reached when he committed the prohibited act. The purpose of this exercise is to ensure that the sentence imposed fits the degree of moral fault of the offender for the harm done.

[31] She went on to say:

To complete the moral blameworthiness picture and to ensure that an offender is properly situated in terms of sentencing vis a vis others convicted of the same offence, the court must also have regard to those personal characteristics of the offender which would mitigate or aggravate culpability.

[32] If I were to place Mr. Ferguson on this ladder of moral culpability, given the facts which the jury must have concluded, he would be on the very lower rungs.

[33] I very much appreciate that being a police officer, trained in the use of firearms, Mr. Ferguson has a higher duty of care in the handling of firearms than would a normal citizen. However, I come back again to the facts upon which the jury must have based their acquittal on the charge of murder.

[34] It was Mr. Varley who initiated the struggle in the police cell. It was Mr. Varley who pulled Mr. Ferguson's gun from his holster. Mr. Ferguson believed he was in danger of death when he fired the first shot. Mr. Ferguson was acting in self-defence at that time.

[35] There was not the same fear for his life when he fired the second shot. However, that shot was fired as a result of his firearms training with the RCMP. It was an almost instantaneous reaction to what had been, but moments before, a life threatening situation.

[36] When we speak of this ladder of moral culpability, we must bear in mind that police officers are required to carry a gun. They are required to take training on the use of their gun. In this particular case, Mr. Ferguson's training taught him to fire two shots when faced with a life threatening situation. It may have been negligent to fire the second shot moments after the first shot is fired in self-defence, but given all of the circumstances that preceded the firing of the second shot and given the jury's finding of lack of intent and his training, Mr. Ferguson cannot be placed very high at all on this ladder of blame.

[37] This was not the action of a person showing a wanton or reckless disregard for the life or safety of others. There was not the gross negligence which accompanies and which is a necessary part of the offence of criminal negligence causing death. Certainly it was unnecessary to fire his gun a second time, when his life was no longer in danger. The jury has said so by their conviction. But they have also said that there was no intent to cause death. There was no intent to cause grievous bodily harm. They have said, that Mr. Ferguson did not deliberately shoot at Mr. Varley's head. The shot was fired because he was trained to react in that manner.

[38] Having assessed Mr. Ferguson's moral blameworthiness, I must now have regard to those personal characteristics of the offender which would mitigate or aggravate culpability.

[39] By way of aggravation, Mr. Ferguson was well trained in the use of firearms. He was in a position of trust with respect to Mr. Varley. The standard of care is higher than would be expected of a normal citizen.

[40] By way of mitigating circumstances, Mr. Ferguson did not initiate the altercation in the cell. Mr. Varley did. He was responding to the fact that Mr. Varley had gotten control of his gun and was desperate to get away. I emphasize that the jury in this case concluded that the first shot was fired in self defence. The second was instinctive. There was at the very most, two to three seconds, or as little as less than a second between when the first shot was fired in self-defence and when the second shot was fired.

[41] Those are the circumstances surrounding the incident. I have gone through them in some detail because I wish to make it quite clear that, with great respect to Mr. Saull, I do not share his view of the characterization of the offence which took place on October 3rd, 1999. In his view, the killing of Mr. Varley amounted to a "near murder". If it were, a sentence of six years or more would be appropriate. However, it was not. The death of Mr. Varley was not the culmination of a feud which began in the hospital and continued on in the police cells. It was not a set up. Given what I have determined the jury concluded based upon their verdict, this was an instinctive reaction to an unexpected and life threatening situation precipitated, not by Mr. Ferguson, but by Mr. Varley.

[42] Insofar as Mr. Ferguson is concerned, he did nothing to conceal any of his actions. He gave

statements when not required to do so. He cooperated fully during the entire investigation. He had been a member of the RCMP for nineteen years before this incident. It would appear that he was a dedicated and respected member of the force. He has no prior criminal convictions.

[43] What then is an appropriate sentence for Mr. Ferguson, having regard to the principles set forth in Sections [718](#) and [718.1](#) of the *Criminal Code* and having regard to what I consider to be the gravity of the offence, the personal characteristics of Mr. Ferguson, and the particular circumstances of this case?

[44] The offence is, needless to say, very serious. A life was taken.

[45] The personal characteristics of Mr. Ferguson are as described as above. It is important to be aware that as an ex-RCMP officer Mr. Ferguson would have a far more difficult time in prison than all others excepting certain sex offenders and informants. He would need to be placed in protective custody for the full period of his imprisonment as his safety and well-being, if not his life, would always be in danger.

[46] The particular circumstances of this case are the facts found by the jury, my conclusions and the emotions, the heat and fear of the moment, and an extremely compressed time frame.

[47] Having regard to all of these circumstances it is my respectful view that, absent Section 236(a), a sentence which would have been, to use the words of Justice Lamer in *Smith* “appropriate to punish, rehabilitate, and deter this particular offender and to protect the public from this particular offender” would be two years imprisonment. I would consider allowing Mr. Ferguson to serve that sentence in the community as I am quite satisfied, having read the numerous letters from his friends and acquaintances in his community, that serving it in the community would not endanger the community.

[48] I am also satisfied that with strict conditions, such a sentence would be consistent with the fundamental purpose and principles of sentencing set out in Section [718](#) to [718.2](#) of the *Criminal Code*.

[49] Having considered what Justice Lamer says I must consider, the question I must now answer is would a sentence of four years or more in prison be found, by an unbiased and informed public, to be grossly disproportionate for Mr. Ferguson. In my respectful view, the answer must be yes.

[50] In what I stress again are the very unique circumstances of this case, including the effect a sentence of four years in prison would have on Mr. Ferguson, when I consider what I believe would, but for the statutory minimum, be an appropriate sentence, I am satisfied that an informed public would consider that four years imprisonment for this particular offender would intolerable.

[51] I therefore find that this is one of those rare instances contemplated by Justices Arbour and McLachlin in *Morrisey* where I am persuaded that the minimum sentence prescribed by Section [236\(a\)](#) of the *Criminal Code* is grossly disproportionate to the particular circumstances of this case. Mr. Ferguson is therefore entitled to a constitutional exemption from the application of Section [236\(a\)](#) of the *Criminal Code*.

[52] In place of the four year sentence required by Section [236\(a\)](#) of the *Criminal Code*, I

sentence Mr. Ferguson to two years imprisonment less one day. From that will be deducted 210 days. This amount of time is to be credited to Mr. Ferguson because of the 70 days which he has already spent in jail. That is a credit of three for one, which is somewhat higher than normal for pre-sentence custody. That is so because of the particularly strenuous and difficult nature of the custody which has incurred in this case.

[53] Mr. Ferguson's sentence may be served in his present community of Kamloops, British Columbia. In addition to the compulsory conditions of a Conditional Sentence Order outlined in Section [742.3\(1\)](#) of the *Criminal Code*, Mr. Ferguson will be required to:

1. Perform 500 hours of community service at the direction of and to the satisfaction of his supervisor and complete the same one month before the expiration of this conditional sentence;
2. Attend counselling on a regular basis for his problems relating to this incident, as directed by his supervisor;
3. Sign such release or waiver of information as directed, providing access to information required by his supervisor;
4. (a) During the first twelve months of this Conditional Sentence, be in his residence or on his grounds at all hours except when
 - (i) performing his community service;
 - (ii) attending medical, dental and health related emergencies or appointments involving himself or members of his family;
 - (iii) attending any assessment, counselling or treatment as is ordered by the Court or directed by his supervisor;
 - (iv) attending such other programs or services deemed appropriated by his supervisor; and
 - (v) travelling directly to and from the locations noted above.
- (b) During the last 22 weeks of this conditional sentence, be in his residence or on his grounds at all hours except when performing the functions described above and seeking out or attending employment.

Heard September 7 to October 1, 2004.

Dated at the City of Lethbridge, Alberta this 10th day of December, 2004.

G.C. Hawco
J.C.Q.B.A.

Appearances:

Rick Saul
for the Crown

Earl Wilson, Q.C.
for the Accused

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