Case Name:

R. v. Kawal

Between
Her Majesty the Queen, and
David Kawal, Tyrel Nicholson and Devonte Rowe

[2018] O.J. No. 6631

2018 ONSC 7531

Court File No.: CR-17-0549-0000

Ontario Superior Court of Justice

D.E. Harris J.

Heard: October 22, 2018.
Judgment: December 14, 2018.

(95 paras.)

Counsel:

Ann-Marie Calsavara, for the Crown.

L. Galway, for the defendant David Kawal.

S. Hinkson, for the defendant Tyrel Nicholson.

R. Mwangi, for the defendant Devonte Rowe.

REASONS FOR SENTENCE

D.E. HARRIS J.:--

INTRODUCTION

1 Modern day miracles do occur. This case is proof. There was not one but two examples of extraordinarily good fortune at 10 Stokes Road, Brampton around 10:26 p.m. on the night of October 16, 2015. Two examples of exceptionally good luck at essentially the same time and place equal a miracle of sorts.

2 First, David Kawal shot 10 .45 calibre bullets with a powerful Glock handgun from about 15 feet away at Acting Sergeant John Alwyn. Alwyn was in uniform seated in the driver's seat of his marked police cruiser. The jury found that Kawal intended to kill Alwyn and convicted Kawal of attempted murder as a result.

3 It was astonishing that Officer Alwyn was not killed. Part of this was luck, part of it was that Kawal was a bad shot. Alwyn was only hit once, in the right arm above the elbow. Sadly, his arm only functions at about 60% of its former ability. Two other bullets went into the cockpit of the car through the open passenger's window. One ripped Officer Alwyn's bulletproof vest, the other went into the driver's door. Six other bullets sliced through the metal of the passenger side of the cruiser. Six large holes were visible in the passenger side of the cruiser. Another bullet was found on the street.

4 Seconds after and a matter of only a few feet away from where Kawal shot Officer Alwyn, Mohammed Ibrahim was shot three times at about six feet away with a 9mm Ruger by either Chris Osborne or Tyrel Nicholson, two of Kawal's confederates. Whoever shot Ibrahim, based on the point-blank range, the power of a 9mm semi-automatic handgun and the three shots, intended to kill him. Ibrahim was airlifted to Sunnybrook Hospital in Toronto. The bullets had gone into his side and abdomen. Incredibly, he was released from the hospital a day or two later with no ill-effects apart from some pain and permanent scarring. The medical report concludes that with respect to each of the three bullets, Ibrahim was extraordinarily lucky. They stayed close to the skin and were at an angle which did not infiltrate the deeper muscles, bones or organs.

5 The shootings were the culmination of a botched plan devised by Kawal, Nicholson and Osborne to accost, rob and then kidnap Ibrahim--at the time a wholesale cocaine dealer--and his girlfriend D'Onna Ellis in Toronto and then take them to Stokes Road in Brampton and hold them for ransom. Each of Kawal, Nicholson and Osborne were armed with a loaded handgun. A brazen, outrageously audacious and dangerous scheme it was. These men saw themselves as gangsters, what with the powerful guns, the extra magazine clips and the firearm holsters.

6 But the men neglected to perform a thorough search of Ibrahim. He was able, upon arrival in Brampton, to use his cell phone to place a call to 911. It was Officer Alwyn who responded to the call. Kawal shot him immediately upon his arrival at the curb outside the 10 Stokes Road residence.

7 After Officer Alwyn was shot, Nicholson and Osborne, the men who transported Ibrahim from Toronto to Brampton, realized that their scheme had unravelled. Ibrahim testified that the two men

ran out the door in the back of the garage after the Kawal shots were heard. According to Ibrahim, one of the men--the Crown alleged it was Nicholson--ran back into the garage and shot Ibrahim with a 9mm handgun three times from about six feet away. He then fled. Nicholson was acquitted by the jury of the shooting, charged as attempt murder and with aggravated assault as an included offence.

8 The possibility that Chris Osborne was the shooter could not be discounted beyond a reasonable doubt. Osborne had a gun too. D'Onna Ellis, Ibrahim's girlfriend, testified that she saw him with one. Two loaded guns were found in the green space close to the scene of the shooting at 10 Stokes Road where Osborne and Nicholson fled after the shooting. The only reasonable inference was that one was Nicholson's and the other Osborne's. Both were similar model Ruger 9mm handguns with their serial numbers obliterated. After the preliminary inquiry, Osborne pled guilty to several charges, including the use of a firearm and was sentenced to a total of ten years. He was not before the court in this proceeding but the jury was informed by an agreed statement of fact what he had done and that he had pled guilty.

9 The odds of one of the two men who were shot surviving were long. The odds of them both surviving were negligible. Yet, they both did survive, albeit Officer Alwyn suffered injuries which have had a profoundly detrimental effect on his career and personal life.

10 The three main perpetrators had strength in numbers to accomplish their criminal objects but, more importantly, they were heavily armed with handguns. There were three guns involved, two 9mm Ruger Austrian made semi-automatics with their serial numbers effaced. The third gun, David Kawal's, was not recovered but we know from the magazine found in his car and the shell-casings recovered from the scene that he was using a .45 calibre Glock semi-automatic, similar to the firearms carried by police officers.

11 Handguns are a social evil. The Supreme Court has said and there can be no possible argument against it, "Gun-related crime poses grave danger to Canadians." *R. v. Nur* 2015 SCC 15, per Chief Justice McLachlin, at para. 1, see also Justice Moldaver in dissent, at para. 131 and Justice Watt, as he then was, in *R. v. Gayle*, [1996] O.J. No. 3020 (S.C.), at para. 28. The primary purpose of handguns is to maim and to kill. Lawyers and judges see first-hand the destruction wrought by handguns. They are a disease, a plague on our communities. We have the means at our disposal to eradicate or at least to drastically curtail them. It is difficult to understand why our society would not do everything in its power to ensure that handguns are not available for criminal purposes.

12 Harming a person without a weapon is not necessarily easy. But with a firearm, very little is needed. A slight degree of pressure applied to the trigger, a causal aim, and someone will likely be killed or severely injured. It is all too easy. We have come to the point where no intelligence or much of anything else is needed to kill or wreak grievous harm on another person. Malevolence is all that is required. Unfortunately, this is not always in short supply. That is a daunting prospect.

13 The proliferation of handguns in the Greater Toronto Area has been decried by the courts and the public for many years. It is a pressing and urgent matter of public safety. Ten years ago, the serious concern of growing gun violence was said by the Court of Appeal to be a necessary consideration upon sentencing: see *R. v. Brown*, 2009 ONCA 563, [2009] O.J. No. 2908, at paras. 29-33, affirming [2007] O.J. No. 5659 (S.C.). It is even more so now what with record murder numbers in Toronto and the continuing increase of gun crimes and violence: see Justice Moldaver in dissent in *Nur*, para. 131 and see generally with respect to taking into account local conditions *R. v. Lacasse,* 2015 SCC 64, [2015] S.C.J. No. 64, at paras. 90-104.

14 Just last week, the Court of Appeal said in *R. v. Omar*, 2018 ONCA 975, per Sharpe J.A. for the majority,

> [54] I am, of course, aware of the grave problem caused by illegal guns and drugs in our society. Everyone in the criminal justice system appreciates fully that the public is understandably alarmed by the prevalence of gun violence that threatens public safety and the public looks to the police for protection. I certainly do not suggest that a community's desire to live free from the threat of illegal handguns is irrational or impulsive. The law must also recognize that the police have a very difficult and dangerous job to perform.

15 The three guns involved in these criminal offences constitute a central aggravating feature in the sentencing of Kawal and Nicholson. The importance of general deterrence, disseminating a message to the public by the imposition of a substantial sentence, varies with respect to the specific offence at issue. For many offences, such as offences committed in the heat of the moment, the philosophy of general deterrence may well collapse. In the category of handgun possession and use, however, general deterrence is a central and vital consideration.

16 A person does not stumble upon an illegal handgun. There is a process of purchasing from a trafficker and secreting the handgun to avoid detection and prosecution. There is a high degree of deliberation and contemplation involved. In order to dissuade those who would possess and use firearms, there is a duty to ensure that there is no mistake about the not-give-an-inch opposition and contempt for all that handguns represent. The utilitarian philosophy animating general deterrence is pertinent. The danger handguns pose to the community cannot be overstated. Word must circulate that appropriate and fit sentences for handguns will necessarily be severe and lengthy sentences.

THE CIRCUMSTANCES OF THE OFFENCES

17 On the night of October 16, 2015, a little after 9 p.m., Ibrahim and Ellis took the elevator in their condominium complex in Toronto to the underground parking level. Ibrahim was going to drive Ellis to her job dancing at the Zanzibar Tavern. As they approached his Mercedes, a group of masked men accosted them with guns. Nicholson was one of them, Osborne was also there. A young offender was also present. Ibrahim was forced into the back of his Mercedes and Ellis was taken to another car, a gold Honda. Their hands were zip tied. When Ibrahim was thought to have

looked at one of the masked men, he was pistol whipped. His nose was broken and his teeth were chipped. They demanded money from him which he said he would give them.

18 Ibrahim was a wholesale drug dealer, trafficking in kilo quantities. The men had got wind of this. They were aware of his "flossing", bragging about his wealth on social media. He had posted a number of pictures. Osborne was later found to have had on his phone Instagram pictures of Ibrahim in front of his expensive car showing off his jewellery. The men also knew that he had been shot previously. Kawal knew the names of Ellis' brothers. The perpetrators had done their research.

19 The men said they wanted to hold Ibrahim for $50,000. He told them that they were crazy, that he was the wrong guy. He said that he knew people who sold drugs and he could try to get some for them but he did not have $50,000. He was trying to make the men feel comfortable.

20 After some time driving around outside the condominium building, Osborne replaced the young offender as the driver of Ibrahim's Mercedes. He drove the car to Brampton. On the way, Nicholson sat next to Ibrahim in the back seat of the Mercedes. Holding a gun to Ibrahim's head, Nicholson said Ibrahim looked at his face. Ibrahim told him that he did not look at his face. The driver--Osborne--said "shoot him: and Nicholson cocked his gun. It was a racking type motion. Nicholson said it was a .45 double action gun.

21 Ibrahim thought he was going to die that night. Upon arrival at 10 Stokes Road, Osborne drove the car into the garage. He and Nicholson got out. This gave Ibrahim the opportunity to call 911.

22 Meanwhile, Ellis after being driven in the gold Honda up to the street level, was taken into her condominium unit by Osborne. He was armed with a gun and a knife and threatened her that if she did not co-operate, Ibrahim's throat would be slit.

23 Osborne told her to take out the money in the safe. Osborne took Ibrahim's clothing, shoes and some ostentatious "bling": two very expensive pendants that had been custom made with gold and diamonds. Approximately $20000 in cash was taken from the safe.

24 Ellis was taken back outside by Osborne and then forced to get into a Volkswagen Jetta. She was driven to Brampton by Kawal. There was a handgun in the car.

25 The Jetta arrived at 10 Stokes in Brampton just after Ibrahim's Mercedes drove into the garage at that address. Ellis testified that Kawal left the car upon arrival, saying that he was going to check out what was happening in the garage. There were voices and a commotion coming from the garage. Immediately after leaving the Jetta, Officer Alwyn arrived in his police cruiser.

26 Ibrahim had called 911 on his cell phone from the Mercedes after it parked in the garage and yelled that his life was in danger. The dispatch was not sure whether he said "life" or "wife." In any case, the cell phone was pinged to get the address and a dispatch call went out. The 911 operator

called Ibrahim's phone and Osborne and Nicholson realized that the police had been notified. Ibrahim ran out the back door of the garage but Nicholson and Osborne caught him and forcibly brought him back in. They beat him and kicked him.

27 Officer Alwyn was the first to respond to the 911 call. He saw Kawal wearing a mask on the driveway of 10 Stokes Road. As Kawal seemed to be walking away from him, Officer Alwyn called to him to come back. Kawal walked a few more steps, turned around and emptied the clip of his Glock handgun at the officer. Despite being shot in the right arm and in terrific pain, Officer Alwyn was able to drive away, knocking over a stop sign on his way.

28 According to Ellis, Kawal got back in the Jetta and then drove her a short distance before letting her out. She ran back to the scene of the shooting to see how her boyfriend, Ibrahim, was. Kawal's Jetta was found abandoned in a nearby driveway. A clip for the Glock was found in the car.

29 Osborne and Nicholson ran from the garage upon hearing the shooting. One of them returned and, in a particularly gratuitous and malicious act, shot Ibrahim three times. Both men then ran from the scene. Osborne was apprehended within a short period of time nearby. Nicholson spent the night in the nearby ravine but then returned to a house close to the scene. He was found sleeping in a vehicle parked in the garage of a neighbouring home. The police, who were conducting a manhunt complete with helicopters and boots on the ground, swiftly apprehended him.

30 A good deal of property from the robbery and the shooting was found scattered through the ravine. The two 9mm Rugers were found, one of them Osborne's, the other Nicholson's. The roots bag which contained a lot of the cash was found. Nicholson doffed his shoes during his escape and these were found too.

31 Ibrahim in his victim impact statement said he no longer feels safe in public or trusts people. He said that his family has been put through agony.

THE APPROPRIATE SENTENCE FOR DEVONTE ROWE

32 Crown and defence have arrived at a joint submission with respect to Rowe. I am in agreement with it.

33 Rowe made available his home at 10 Stokes Road to the principals. He was charged with robbing Ibrahim with a firearm and kidnapping Ibrahim with a firearm. The jury, not being convinced that he knew that firearms were to be used, convicted him of the included offences of robbery and kidnapping simpliciter.

34 In voice memos found on his cell phone, Rowe is heard saying they were only going to bring Ibrahim, who is not named, to "my spot and park him in the garage for a little bit." It just went bad. It was not worth it. He was not even there.

35 He also opened up to the undercover police officers placed in his cell after arrest. Rowe repeats over and over what hot water he is in, using more colourful language. If they had not got his phone, it might be different he implies. He says he is pissed and that he is "done." He complains at one point that he was charged with the wrong offence because his only involvement was telling his cousin (Nicholson) that he could use his house. Rowe said to the undercover officer that they needed a place to put him, so he agreed they could put him in his garage. He seemed to agree with the officer that was the bad part.

36 Although the jury finding that Rowe did not know about the firearms does not necessarily imply that they found he was largely ignorant of many aspects of the scheme, taking the jury finding and my own observations together, I am of the view that Rowe was mainly in the dark about the specifics. He did say "it's eat food for a brick..." which was a reference to drugs and money. So he knew that drugs were involved in the robbery and probably knew that Ibrahim was a drug dealer whom the main perpetrators were going to "rip off." But he probably did not know much else.

37 Rowe turned 23 years old in September of this year and was 20 years old at the time of the offence. Rowe has done some work in warehouses in the past. He wants to become an auto mechanic, preferably on high end cars. Although he has a criminal record, these criminal offences were his first offences in law. I am told that he is embarrassed and ashamed. He has a supportive family including his mother and two younger sisters. His prospects for rehabilitation are good.

38 The joint submission is for four years gaol. As of the sentencing hearing on October 22, 2018, this joint submission with pre-trial custody, translated to three months additional custody. Subtracting 30 days for a sentence on an unrelated matter served while in pre-trial custody, Rowe had done to that point 30 months pre-trial custody, equivalent to 45 months with the *Summers* 1 to 1.5 credit. He has now done an additional almost month and a half since the sentencing hearing.

39 He will be sentenced then to time served which is 31.5 months pretrial custody, deemed equivalent, rounding up a bit, to a 4 year sentence, concurrent on each count.

THE APPROPRIATE SENTENCE FOR NICHOLSON

40 Nicholson together with Kawal and Osborne were the main perpetrators of the robbery and kidnapping. The evidence proved that Nicholson was one of the men who accosted Ibrahim in the underground parking lot at gunpoint. He sat in the back seat of Ibrahim's Mercedes with the gun to Ibrahim's head while it was being driven to Brampton by Osborne. The jury acquitted him both of attempted murder for shooting Ibrahim in the 10 Stokes Road garage and for the included offence of aggravated assault for shooting Ibrahim. The jury was directed in the charge to convict of at least aggravated assault if they found he was the shooter.

41 I must be careful in sentencing Nicholson not to sentence him for shooting Ibrahim, the jury having found he was not established beyond a reasonable doubt to have been the shooter.

42 The jury did not convict Nicholson of the offences for which he was put in their charge. However, at the outset of the trial, much to the Crown's surprise, Nicholson pled guilty before the jury to robbing Ibrahim while using a gun, kidnapping Ibrahim while using a gun and possessing the gun. I will stay the possession of the gun count under the *Kienapple* principle. While charged with the same robbery and kidnapping using a gun offences against D'Onna Ellis, the jury acquitted him and Kawal of both of these. There was some evidence that Ellis may have been involved in the scheme to rob and kidnap Ibrahim. The jury was not convinced that she was not involved. Nicholson had a prior casual relationship with her and asked her by text on the day of the crimes when she was going to leave for work. She told him. There were other suspicious circumstances which were argued by the defence and obviously persuaded the jury.

43 The guilty pleas are due some mitigation but on a relatively low scale. The rationale for giving credit for a plea of guilty is based on two factors: 1. As a sign of remorse; and 2. For saving of time and resources: *R. v. Johnston and Tremayne*, [1970] 2 O.R. 780, [1970] 4 C.C.C. 64, [1970] O.J. No. 1489 (C.A.), at para. 9; *R. v. de Haan*, [1967] 3 All E.R. 618. Neither has much force in this case. The pleas were primarily entered for strategic reasons. While this does not preclude some mitigation, it is significantly reduced. The second rationale, credit for saving valuable resources, is an extremely urgent and important consideration here in time and resource strapped Peel and one emphasized by Justice Durno in the Osborne sentencing. It has no application in this sentencing whatsoever.

44 It is appropriate that a case-sensitive approach be taken to the mitigating effect of guilty pleas: see *R. v. Lacasse*, at para. 81, *R. v. O. (C.)*, (2008) 91 O.R. (3d) 528 (Ont. C.A.), at paras. 46-47. It ought not to be unthinking or automatic. Here some credit is due but it is somewhat limited.

45 The sentencing of Nicholson must then proceed on the basis of only the two offences of robbery and kidnapping Ibrahim using a gun. He was obviously in on the planning of the entire scheme. He accosted Ibrahim in the underground and was party or principal to the breaking of Ibrahim's nose and teeth. Nicholson pointed his gun at Ibrahim throughout the drive to Brampton and threatened him several times. He was close to the scene when Ibrahim was shot on the floor of the 10 Stokes Road garage. While it was not proved that he committed the shooting, that act and Kawal's shooting of Officer Alwyn demonstrates that these men, all armed with handguns, were perfectly ready as part of their scheme to shoot people with their deadly weapons if necessary. The atmosphere of extreme violence including the beating of Ibrahim and the two shootings the three main perpetrators should all bear responsibility for. This is an aggravating factor in the sentencing of both Nicholson and Kawal.

46 The Crown requests a sentence of 13 years for Nicholson. The defence comes in at 6 to 7 years. A central feature in the sentencing of Nicholson is the requirement of parity with Osborne who pled guilty to several offences after the preliminary inquiry and was sentenced to a total of 10 years by Justice Durno. The parity sentencing principle, long a constant of the common law in sentencing, is now codified in Section 718.2(b) of the *Criminal Code*,

> A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

47 Osborne's guilty pleas were for robbing Ellis while using a restricted or prohibited firearm, kidnapping Ibrahim while armed with a restricted prohibited firearm, committing an aggravated assault on Ibrahim by wounding and being in possession of a firearm while prohibited by a previous court order. The aggravated assault was not specified as the shooting of Ibrahim. The Crown requested essentially the same sentence as for Nicholson, 12-13 years. The defence sought a sentence of 8 to 9 years.

48 In meting out the sentence of 10 years, Justice Durno broke it down as 8 and a half years for the three offences committed October 16, 2015 and 18 months consecutive for the weapons prohibition breach. I think it is fair to say that totality played some role between the two groups of offences. The sentence for the October 16, 2015 offences might have been slightly longer if it were not for the weapons breach sentence.

49 Mr. Hinkson points out that, unlike Nicholson who had no criminal record, Osborne had quite a serious criminal record, including for firearms. He received three years plus a weapons prohibition order for a firearms offence for which he pled guilty in 2011. The other entries on his record were primarily property offences with the exception of an assault and an obstruct police. When he committed the current offences, he was subject to two separate weapons prohibition orders.

50 At the outset of this sentencing hearing, Nicholson pled guilty to a breach of recognizance charge for being in possession of the handgun. He had been released on a charge prior to these offences. It was later dismissed. His bail prohibited possession of weapons. Being in possession of the handgun was a breach of this condition. I propose a 6 month concurrent sentence with respect to this count.

51 In summary, evaluating parity with Osborne, I take account of several differences. First, unlike Osborne, Nicholson does not have the full benefit of a guilty plea either in terms of a sign of true remorse or saving the beleaguered administration of justice in this courthouse precious time and resources. Although he opened up to the undercover officer in the cell, he of course did not know that what he said would be tendered against him. It was not so much remorse as the volubility which comes when relieved of an exhausting and terrifying experience.

52 Osborne had a significant and co-ordinate criminal record while Nicholson had none. In this same connection, Osborne had a record for firearms and was prohibited from possession of them. Nicholson has no known history with firearms.

53 This is significant for Nicholson's prospects. Nicholson is an enigma. He has none of the history or demeanour of a man capable of such serious crimes. Nicholson once had a promising future. He is now 26 years of age. He has a younger sister. His parents separated early on and he was raised by his mother in a loving environment. He has a grade 12 education. Apparently he did

well enough in school but could have done better if he had applied himself fully. He worked from an early age, first for his uncle on construction when he was 14 and later at the Rogers Centre and in a warehouse. He started his own business involving scrap metal and garbage collection. He appears to be an industrious and hard working person. When released, he has a job waiting for him working for his uncle.

54 Nicholson was a gifted hockey player, playing goalie in Triple A. He had aspirations to play in the N.H.L. but at the time, he was skinny and underweight. The impact of the puck was painful to him, perhaps surprising given the protection of modern day equipment. And so he quit hockey.

55 The gangster lifestyle appealed to Nicholson. Hopefully that was the folly of youth and, with the support of his girlfriend and family, he will right himself. He is to be treated as a youthful first offender: see *R. v. Priest* (1996), 30 O.R. (3d) 538 (C.A.), at paras. 17, 21-22, *R. v. Borde* (2003), 63 O.R. (3d) 417 (C.A.), at para. 36, *R. v. Thurairajah* 2008 ONCA 91, [2008] O.J. No. 460, at paras. 41-44. Two very positive character letters were filed on his behalf. His rehabilitation prospects are good. However, I do agree with the Crown that the assault in custody and the lifestyle he has led, involving guns and drugs, prevents unalloyed optimism for his future.

56 Osborne's offences were against both Ibrahim and Ellis while Nicholson's were only against Ibrahim. But both were engaged in a scheme in which three loaded handguns were used in offences of robbery and kidnapping and in which there was a very high risk to life and limb. Two men were shot and might easily have been killed.

57 Parity does not require the same sentence for Osborne and for Nicholson. The parity principle cannot be applied rigidly. Furthermore, no two offenders and two offences are exactly alike. There are too many variables involved for perfect parity to be attainable. It is sufficient if the two sentences sit one with the other in a way that they both are rational and understandable. Only a marked and substantial disparity amounts to an error in principle: *R. v. Beauchamp*, 2015 ONCA 260, [2015] O.J. No. 1939, at paras. 276-280, *R. v. Issa (T.)* (1992), 57 O.A.C. 253, at para. 9, leave to appeal to S.C.C. refused, [1992] S.C.C.A. No. 476.

58 The defence recommendation of 6 or 7 years for Nicholson is clearly outside the range and demonstrably unfit. On the other hand, the Crown recommendation of 13 years, while within the range, is too high when parity with Osborne's sentence is factored in. In my view, taking everything into account, the proportionate and fit sentence for Nicholson is 10 years. On each of the two convictions, 10 years concurrent and then 6 months concurrent for the breach of recognizance count.

59 Nicholson has been incarcerated since his arrest on October 17, 2015. That is a total of almost exactly 38 months. With the *Summers* 1.5 to 1 credit, it is equivalent to 57 months.

60 The actual sentence I impose, allowing for pre-trial credit, is 63 months or in other words, 5 years and 3 months concurrent. An order will go for a DNA databank sample and for a firearms

prohibition for life.

THE APPROPRIATE SENTENCE FOR KAWAL

61 Kawal was convicted by the jury of the attempted murder of Officer Alwyn and the robbery and kidnapping of Ibrahim. Like Nicholson, the jury acquitted him of the Ellis counts. With the concurrence of the Crown, I did not put the possession of the handgun count to the jury. As was the case with Nicholson, it was redundant and subsumed in the robbery and kidnapping counts which included the use of a firearm as a particular. This count should be withdrawn by the Crown.

62 The position of the Crown on sentence is that Kawal should be sentenced to life in prison and parole should be delayed under Section 743.6(1) of the *Criminal Code*. The usual parole eligibility for a life sentence is 7 years. The invocation of the parole delay provision would mean that Kawal could not be parole eligible for an extra 3 years; that is, at the 10 year mark.

63 Ms. Galway on behalf of Kawal argues for a sentence of 16 to 18 years and is of course opposed to parole being delayed.

64 The major focus for the sentencing of Kawal must be the attempt murder. Before we get to that a few other comments. Ms. Galway argues that Kawal was not involved in the accosting of Ibrahim and Ellis in the parking garage. It is true that Kawal knew Ibrahim from school long ago and they had bumped into each other about a week before the offences. Efforts were made to ensure that Ibrahim did not see Kawal. But Ellis said that the same person drove her out of the garage as drove her to Brampton. We know that the jury found that Kawal drove her to Brampton.

65 In any case, it is of no real consequence. This was a long planned, thoroughly researched, joint enterprise. Kawal was undoubtably party to the accosting in the garage. Whether he was there or not, he was an integral part of what was a joint enterprise. The jury found him guilty of robbing and kidnapping Ibrahim with an illegal handgun. If one were to hive it off, Kawal would if these offences stood alone, be liable to a sentence in the same range as Nicholson's for the kidnapping and robbery of Ibrahim.

66 David Kawal has a grade 12 education. His parents are separated. I am told that he does not have a substance abuse problem. He has two children, one of whom was born while he has been in custody. His common law wife is standing behind him.

67 Looking at the attempt murder, the offence is on an exceedingly high scale of seriousness. The details have been covered above. The moral blameworthiness for attempt murder is one of the highest for any criminal offence. An attempt murderer is a murderer who by happenstance and, not withstanding his or her best efforts, intended to kill but failed. In this sense, an attempt murderer is a "lucky murderer." His moral culpability is equivalent to that of a murderer, the only difference is the consequence of death, intended as it was, did not result. That is of course very fortunate for the offender and for the victim. While sentences for attempt murder vary widely, severe penitentiary

sentences are typical: *R. v. Forcillo*, 2018 ONCA 402, [2018] O.J. No. 2263, 141 O.R. (3d) 752, at paras. 128-133, leave refused [2018] S.C.C.A. No. 258, also see *R. v. McArthur* (2004), 182 C.C.C. (3d) 230 (Ont. C.A.), at paras. 47-48, *R. v. Stubbs*, 2013 ONCA 514, 300 C.C.C. (3d) 181 (Ont. C.A.), *R. v. Tan*, 2008 ONCA 574, 268 O.A.C. 385 (Ont. C.A.), at para. 35, *R. v. Chevers*, 2011 ONCA 569, 282 O.A.C. 388 (Ont. C.A.), at para. 8.

68 There are several key aggravating features. From a rational, detached perspective, it was clear when Officer Alwyn pulled up that the criminal scheme devised by Osborne, Nicholson and Kawal lay in ruins. Why then attempt to kill Officer Alwyn? Probably the same reason that Ibrahim was shot. To ensure that the men would escape apprehension. No witnesses would remain. Or it may just have been the instinctive reaction of a man in the midst of committing very serious crimes.

69 Some men might have fired a few shots and then, aghast by what they had done, would take flight from the scene. Kawal emptied the clip of his gun, 10 shots in all. A few shots may have been fired in panic but emptying the entire clip suggests something much more steadfast, deliberate, cold and hardened.

70 This is the first aggravating feature. There is a spectrum of attempt murders based on the threat posed and the persistence of the offender. In this case, the attempt was not half-hearted. It was deadly force applied repetitively, persistently. The holes in the cruiser show the power of the firearm. If the firearm could cut those holes in metal what would they do to a human body?

71 The aggravating feature of the firearm has been discussed above. Another central aggravating feature is that this attempt murder was on a police officer. Officer Alwyn was called to the scene to assist in response to a call from Ibrahim that his life was in danger. As we know now, if anything, that was an understatement. Police officers protect their community. They are often put in harms way; that is their job. Because of the danger of their work, police officers are vulnerable. Courts have the duty to protect them as an adjunct of general deterrence and denunciation: *R. v. Cahoose*, [1983] B.C.J. No. 760 (C.A.), at para. 11, *R. v. Powell* 2009 ONCJ 496, [2009] O.J. No. 4702, at para. 17.

72 There are numerous cases holding that it is an aggravating factor when offences against the person are committed against police officers: *R. v. Jackson* (2002), 58 O.R. (3d) 593, [2002] O.J. No. 1097 (C.A), at para. 61. It is only logical. There is also guidance to be derived from the legislative judgment in Section 231(4)(a) of the *Criminal Code* that second-degree murder committed against a police officer in the course of his or her duties is raised to first degree murder. There is a potential of 15 additional years of parole ineligibility on a life sentence for killing a police officer. While not necessarily required to impose the same judgment as embodied in the legislation, there is no reason not to do so in this instance.

73 Shooting and attempting to kill Officer Alwyn as he was responding to an urgent call of a life in danger is a key aggravating factor. This went to the heart of Officer Alwyn's function as a police officer to protect the lives and safety of the community.

74 Officer Alwyn was lucky not to be killed but he was seriously injured. The bullet wound he took to his right arm has drastically altered his life. Another bullet grazed his bullet proof vest. With the 10 bullets fired, there are many "what if" scenarios which do not have a good ending.

75 At trial, the damage to the right arm was detailed in evidence. There was X-ray film entered into evidence of the plates and screws that were required to put the arm back together. Officer Alwyn testified that three years after the wound, he has only about 60% of the use of the arm back.

76 I was impressed with his victim impact statement which he read in court. Although he must harbour some resentment, in seeing him as a witness during the trial and then upon sentencing, it is difficult to detect. Officer Alwyn came to policing about 10 years after most of his colleagues. It was the accomplishment of a long-time goal to serve the community he grew up in. His career was progressing well at the time he was shot. He was receiving commendations, was acting as a mentor for others and his work was recognized by his supervisors. He was in the position of an acting sergeant on the night in question, as he often was during this time. As he said, his career was just starting to take-off.

77 The bullet shattered his humerus bone in his upper right arm. Aside from the excruciating pain, the arm is permanently weakened and disfigured. He can no longer hold a hockey stick, throw a ball or swim normally. Searing pain in the arm flares up unexpectedly. Moving anything more than 30 pounds causes pain.

78 Officer Alwyn's career has been severely affected. He has not been able to return to his patrol duties or driven a cruiser as a front-line officer. It is to be hoped that for an officer like Officer Alwyn injured in the line of duty, every effort will made to find him work appropriate to his service and sacrifice and one accommodating his infirmity.

79 Lastly, Officer Alwyn stated that although his nightmares of being shot have disappeared after three years of therapy, his family is still trying to overcome the trauma and stresses from the shooting. His marriage has been affected. Officer Alwyn is haunted by the realization that if he had got out of his cruiser, he would certainly have been killed.

80 The last aggravating factor is David Kawal's criminal past. At the time he committed these offences, he had been paroled from the penitentiary just two months before and had been living at Harbour Light halfway house in Toronto. He called into his halfway house supervisors on the night in question just an hour or two before Ibrahim and Ellis were accosted in the underground garage. The offences he had been serving time for were firearms offences, including possession of a firearm with the serial number obliterated and a breach of a firearms prohibition order. The total sentence he received was for 8 offences committed in 2011. He pled guilty in January of 2014 in Toronto and received a total of 5 and a half years (without taking account of time for pre-trial custody) and a firearm prohibition order for life.

81 During the sentencing hearing before this court, Kawal did not dispute that, as alleged in an

indictment placed before the court, at the time of these offences, he was bound by a firearms prohibition order. The jury found that he possessed a firearm on the night in question. I made a finding of guilt against him on the new indictment. The sentence to be imposed ought to be concurrent.

82 Specific deterrence, the idea that a lengthy jail sentence would give an offender pause for thought before reoffending, was manifestly ineffective last time. Mr. Kawal went from his past criminal handgun offences to commit even more serious handgun offences.

83 In addition he has a previous criminal record going back to when he was 14 years of age. Although it does not appear Kawal served significant prison time before the 2011 firearm offences, there is quite a seamless line of serious criminal convictions. They include youth court offences of carrying a concealed weapon and assault with a weapon, two robberies and two drug trafficking convictions (one of each in 2008 and in 2009), forcible confinement and another possession for the purpose of trafficking offence from 2010. In addition, there are numerous breach of court order convictions.

84 General deterrence and denunciation require a stern sentence. These were exceedingly serious, planned offences. Apart from the somewhat abstract sentencing principles of denunciation and deterrence, there is an urgent practical reality here. David Kawal is a dangerous man. After an aborted kidnapping and robbery, he attempted to kill a police officer by shooting 10 bullets at him with a powerful handgun. At the time he had just been released on parole for another serious firearms offence. His criminal history would suggest that, as of now, there is a good chance that if he was free in the community, he would again arm himself with a handgun. He might well kill someone next time.

85 Section 718(c) of the Criminal Code reads,

> **718.** The fundamental purpose of sentencing is 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:
>
> c) to separate offenders from society, where necessary

86 The danger that David Kawal currently presents requires he be separated from society. The salient factor is the shooting and attempt to kill Officer Alwyn. In the result, adding up his antecedents including most importantly his previous gun offences, the fact that he had just been released on parole for the gun offences, a life sentence is the appropriate, fit and proportionate sentence in this case.

87 For a life sentence, pre-trial time is subtracted for the purpose of parole but on a 1 for 1 basis:

see Section 746(a) of the *Criminal Code*. Here counsel are agreed that it would run from the time of the warrant expiry of Kawal's previous sentence, which is May 27, 2017. He has then approximately 5 and a half years to serve before he is eligible for parole.

88 The Crown requests that parole be delayed from 7 years to 10 years, ensuring that David Kawal would not be parole eligible for 8 and a half years from now. The judicial power to delay parole is found in Section 743.6(1) and (2) of the *Criminal Code*:

> **743.6** (1) [Power of court to delay parole] Notwithstanding subsection 120(1) of the *Corrections and Conditional Release Act*, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, *having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires*, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.
>
> ...
>
> (2) [Principles that are to guide the court] For greater certainty, the paramount principles that are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to those paramount principles.
>
> (Emphasis Added)

89 In the leading case of *R. v. Zinck* 2003 SCC 6, [2003] 1 S.C.R. 41, Justice LeBel commented that together with the setting of parole eligibility for second degree murder under Section 745.4 of the *Code*, this delay of parole provision stands as an exception to the general rule that parole issues have no part to play in judicial sentencing.

90 In *Zinck*, Justice LeBel made these observations about the operation of Section 743.6:

> i. Delaying parole should not be ordinary or routine. Nor should it be applied in an automatic manner. The provision should "be invoked only on the basis of demonstrated need." It is a special, additional form of punishment. The prosecution bears the burden of proof (Zinck at paras. 29-31).

ii. The trial judge should first determine the length of the sentence based on the usual sentencing principles (paras. 24, 30, 33).

iii. In considering delayed parole, the judge must give priority to deterrence and denunciation as commanded by Section 743.6(2). Rehabilitation and other factors are subordinated (para. 30).

iv. Finally, the judge, ought only to delay parole if it is viewed as necessary in order to fulfill the objectives of denunciation and deterrence. Justice LeBel refers to this as a double weighing exercise. Deterrence and denunciation are considered a second time, this time with respect to the delayed parole question (paras. 31, 33).

91 Applying these guidelines, the prosecution has failed to demonstrate that delaying parole for David Kawal is necessary or required. The life sentence is obviously a heavy one. There is a major dose of deterrence and denunciation achieved through its imposition. No additional deterrence or denunciation is required.

92 There is an important reality which is the major driver in this conclusion. David Kawal is a young man. He was 23 years old at the time of the offences and is now only 26. For a judge to look down the road to Kawal's parole eligibility in approximately 5 and a half years is well nigh impossible. Judges are not provided with crystal balls upon their appointment. How can it be said from our current standpoint that in 5 years, in order to satisfy deterrence and denunciation, there ought to be 3 more years of parole ineligibility?

93 On the other hand, the parole board will have a large volume of material with respect to Kawal's performance in the penitentiary. Both with their superior expertise and with a wealth of up to date information, it is inarguable that they will be in a better position than I am sitting here today to ascertain whether Mr. Kawal should be paroled. The infinitely better position of the parole board would made delaying parole in this case fundamentally wrong and from a human management perspective, both imprudent and inefficient.

94 Delayed parole to extend ineligibility from 7 to 10 years would only be appropriate if deterrence and denunciation were of such dominance that they required substantial additional weight. That is not the case. Moreover, although Section 734.6(2) subordinates rehabilitation to other sentencing principles, it does not extinguish it. If it could be said there is no chance of rehabilitation, delaying parole would be a much more powerful argument. But although the odds are strongly against David Kawal rehabilitating himself in our penitentiary system, a system unfortunately not geared to rehabilitation, it is not out of the question: see *R. v. M.(M.)*, [2004] O.J. No. 325 (S.C.), at para. 69. To foreordain this would be to abandon all hope for him and, figuratively speaking, throw away the key. This would be unduly pessimistic. Particularly in view

of his age, a defeatist attitude is premature. To allow some room for rehabilitation is overwhelmingly in both the public interest and David Kawal's interest. See by analogy the preference of come courts to leave parole release to the parole board in cases of second degree murder where mental illness is a substantial cause: *R. v. Levy*, [1997] O.J. No. 3505, at paras. 13-14 (C.A.), *R. v. Chen* 2015 ONSC 3759, [2015] O.J. No. 3134, at paras. 26-29.

95 The sentence for David Kawal is to broken down as: Attempt murder, life in prison with normal parole under Section 745(d) of the *Code*; Robbery of Ibrahim with a restricted or prohibited weapon, 10 years concurrent; Kidnapping of Ibrahim with a restricted or prohibited weapon, 10 years concurrent. For the breach of the firearm prohibition, two years concurrent. The ancillary orders for DNA and a firearms prohibition for life will go as requested by the Crown.

D.E. HARRIS J.