SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Gillis*, 2018 NSSC 22

Date: 2018-01-31
Docket: CRH No. 458699
Registry: Halifax

Between:

Her Majesty the Queen

v.

Benjamin Joshua Gillis

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Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 31, 2018, in Halifax, Nova Scotia
Written Decision:	February 8, 2018
Subject:	Section 236(b) Criminal Code – Manslaughter sentencing
Summary:	Mr. Gillis, with a knife in hand, confronted the victim. They argued. Mr. Gillis stabbed the victim once in the torso, which perforated his kidney. He left the premises. Only a hysterical 16-year-old who had witnessed the incident, and had been using illegal drugs, was still present. Neither Mr. Gillis nor she called 911. The victim died from the stabbing. Initially charged with second-degree murder Mr. Gillis pled guilty to manslaughter on the eve of trial. In spite of an Agreed Statement of Facts, the circumstances surrounding the stabbing were still largely undefined.
Issues:	(1) What is the range of sentence, and where on that range do the circumstances of Mr. Gillis and the offence lie??

(2) Should Mr. Gillis receive an enhanced presentence remand credit per Section 719(3)?

Result: (1) The range of sentence for this stabbing is 7 to 11 years in jail. Sentenced to nine years in jail. The aggravating factors included: his criminal record; being on more than one probation order at the time, and specifically on probation for assault causing bodily harm; that he did not ensure that the victim received medical assistance as soon as possible; that the offence involved a knife; that Mr. Gillis was the aggressor and acted in anger; that he stabbed the victim in the torso, penetrating into the interior; that the victim was stabbed in his home; that the impact of the loss of the victim on his family, included a six-year-old for whom the victim was the only parent. The mitigating factors included an albeit late guilty plea, but also much earlier expressions of remorse – and offer to plead guilty to manslaughter; his relative youthfulness, and rehabilitative potential.
Court specifically and at length addressed whether provocation can constitute a mitigating circumstance in manslaughter sentencings. But for Section 232 Criminal Code or meeting the historical common law requirements for provocation, mere provocation should not be seen as a mitigating factor.

(2) Enhanced credit given on consideration of *R. v. Carvery*, 2014 SCC 27.

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Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 31, 2018 in Halifax, Nova Scotia
Written Decision:	February 5, 2018
Counsel:	Christine Driscoll and Kim McOnie, for the Crown Peter Planetta for the Defence

By the Court:

Introduction

[1] On March 2, 2016, Benjamin Gillis stabbed Blaine Clothier to death. Mr. Gillis was arrested that same day, and charged with second-degree murder. On January 8, 2018, being four days after Mr. Gillis's 27th birthday, and the first day of his Judge and Jury Trial, the Crown agreed to accept his guilty plea to manslaughter. [1]

[2] It now falls to the court to determine what sentence is appropriate, given the circumstances of Mr. Gillis, and the circumstances of the offence.

[3] The Crown argues for a sentence of 13 years in custody, less "time served" based on a calculation of an appropriate pre-sentence remand credit of 1 to 1 (i.e. one-day sentence custody credit for each one day served by Mr. Gillis since March 2, 2016 when he was arrested).

[4] Mr. Gillis argues for a sentence of 7 years in custody, less "time served ", based on a calculation of an appropriate pre-sentence remand credit of 1.5 to 1.

The circumstances of the offence

[5] These are outlined in the Agreed Statement of Facts (ASF).

[6] In addition, the court has the benefit of Mr. Gillis's two videotaped statements given to police officers March 2 and 3, 2016, as well as the admissible statements he made to an undercover police officer posing as a detained criminal in a cell adjacent to his, and in a sheriff's van when they were travelling together to court on March 3, 2016. I appreciate that I should be somewhat cautious in finding facts solely from those statements because, among other things, Mr. Gillis's credibility cannot reliably be assessed without being tested by cross-examination, nor has their reliability been established in comparison to other evidence that one would expect during a trial process.

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[1] An Agreed Statement of Facts of the circumstances of the stabbings is attached hereto as Appendix "A". The guilty plea came within days of the court advising the parties that all three of the statements made by Mr. Gillis to police officers and an undercover police officer respectively would be admissible at his trial – see the written decision 2018 NSSC 20.

[7] In addition to the ASF, I find I am satisfied, it is more likely than not, and so beyond a reasonable doubt where aggravating factors are implicated, that the facts are as follows.

1. Mr. Gillis and Mr. Clothier (approximately 27 years of age in March 2016) had been friends for some years. Mr. Gillis had up until approximately December 2015 been intimately involved with a 15 – 16-year-old girl, S., who in February 2016, had become intimately involved with Mr. Clothier. All three were regularly using illegal (prescription and non-prescription) drugs throughout this time.
2. In the evening of March 1, 2016, Mr. Gillis injected himself with the residue of five tablets of "speed"/(meth)amphetamine. Although he had his own residence on Inglis Street, he was staying overnight at the residence of Ms. King, who was not present, but had permitted S. and Mr. Clothier to stay there on an ongoing basis. I infer that all those present were consuming one or more forms of illegal drugs.
3. Mr. Gillis had reason to believe that Mr. Clothier was introducing S. to more dangerous forms of drugs, and causing her to be involved in the sex trade, in order to fund her drug habit. He also was aware that Mr. Clothier and S. were in an intimate relationship. Mr. Gillis still had strong feelings for S.

[8] I conclude it more likely than not that the confrontation that ensued and lead to Mr. Clothier's death, arose primarily because Mr. Gillis objected to what he perceived to be Mr. Clothier's exploitation of the vulnerable S.

[9] This led to Mr. Gillis "shoving Mr. Clothier while holding a kitchen knife. Mr. Clothier tried to disarm Mr. Gillis. Mr. Gillis stabbed Mr. Clothier. Mr. Clothier fell against a weight bench in the apartment and then onto the floor. S went to the bathroom crying. Mr. Gillis left the apartment, leaving the knife behind… Mr. Clothier had four superficial wounds to his upper body. He [also] had one fatal wound in the lower, front torso. It was 2.8 cm in length. It perforated his kidney, liver and major blood vessels. He bled internally and passed away."

[10] Although S. remained in the apartment, I am satisfied that she was hysterical. She exited the apartment in this manner approximately half an hour later, when a man walking his dog spoke to her, and then called 911. By the time EHS and police attended to Mr. Clothier, he was deceased.

[11] Mr. Gillis was taking methadone treatments at that time. After exiting the apartment, he made his way to the area of Guardian Drugs store on Herring Cove Road where a mobile Direction 180 vehicle was dispensing methadone to approved recipients, such as Mr. Gillis. At some point, he telephoned S. to see how Mr. Clothier was doing. He was angry with her because she had not called to get help for him, although neither did Mr. Gillis.

[12] Interestingly, police did not tell Mr. Gillis what they knew about the stabbing, yet on March 2, 2016, during the videotaped interview, Mr. Gillis asked Detective Constable Blencowe:

> I want to know how he actually, like, did – like, did he catch it *in the kidney* or something, like? They don't know yet, eh? They'll probably not know all that detail until they…
>
> [Detective Constable Blencowe]: Well I'll ask you this, I'll be straight up. Where do you think he caught it?
>
> [Mr. Gillis]: I don't know.

[13] As noted in the Agreed Statement of Fact, Mr. Clothier was stabbed in the kidney. I conclude that Mr. Gillis was well aware, as he did it, that he had stabbed Mr. Clothier in the area of the kidney. I also conclude that the four superficial wounds to the upper body were as a result of Mr. Gillis's use of the knife.

[14] Therefore, when Mr. Gillis left the apartment, he was well aware that Mr. Clothier was in need of immediate medical assistance.

The circumstances of Mr. Gillis

[15] I have his January 19, 2018 updated Pre-Sentence Report (PSR), and the August 19, 2015 PSR for the sentencing of the February 9, 2015 assault causing bodily harm upon Mr. Gillis's then girlfriend, Francis Masakeyash. I also have his criminal record attached to both the August 19, 2015 and January 19, 2018 PSRs.

[16] Collectively, he has 10 convictions as a youth, and 62 as an adult. Of those, only four involved physical violence: [2]

[2] In its January 29, 2018 email, the Crown provided summaries of facts they say are associated with the sentencings on: August 26, 2010 – Section 90 Criminal Code; March 9, 2012 Section 344 Criminal Code; August 25, 2015 Section 267(b) Criminal Code; and May 4, 2015, various offences including assault and assault on a police officer.

a. February 9, 2015 – s. 267(b) assault causing bodily harm on his then girlfriend – Sentenced August 25, 2015 to 10 months custody and two years probation; [3]

b. March 31, 2015, ss. 270(1), 266(b) summary assaults against a police officer and EHS staff trying to assist Mr. Gillis – Sentenced May 4, 2015 to 60 days custody intermittent;

c. July 5, 2011, s. 344 as a party to a robbery with an axe – Sentenced March 9, 2012 to 10 months custody and two years probation;

d. August 23, 2010, s. 90(1) carrying a concealed weapon- a sheathed 12 inch fillet knife in the front of his pants upon being arrested by police - Sentenced August 26, 2010, to 30 days custody and nine months probation August 26, 2010.

[17] I also have the benefit of the three statements he gave to police officers which outline some of his previous life circumstances.

[18] The Crown also provided a documentary record of "recorded security incidents from Mr. Gillis's time on remand".

[19] These are relevant to whether Mr. Gillis should receive an enhanced credit pursuant to Section 719(3) Criminal Code. The Crown is relying only upon those that are recorded since Mr. Gillis's arrest March 2, 2016. I accept those as admissible evidence, however note that they are very bare-bones descriptions of misbehaviour by Mr. Gillis. Moreover, they have not been tested even by an administrative hearing process, so I cannot accord them much weight.

[20] Nevertheless, therein are the following noted misbehaviours, as to date and type:

1. November 18, 2016 – intimidation;
2. December 2, 2016 - ripped a bed sheet;
3. December 29, 2016 - "detrimental behaviour" – which was based upon Mr. Gillis pressing the duress button in his cell, claiming he had

[3] In its January 25, 2018 letter, the Crown provided additional clarification regarding the criminal record convictions of Mr. Gillis. Specifically, they noted that in relation to the assault causing bodily harm, though the record indicates 94 days custody, and two years' probation, he was in fact sentenced to 10 months in custody but received 206 days pre-sentence remand credit, thus only 94 days in sentence remained going forward.

no meal tray, while in fact he had returned his food-laden tray to the correctional officer, complaining it was cold;

4. January 5, 2017 - possession of contraband – 3 inch shank made of plastic found in his cell;
5. June 10, 2017 - disobey order – refused to lock-in during lockup time and attempted to continue his phone call/offender argued;
6. January 5, 2018 - disobey order – became agitated after being asked to pack his belongings as he was being transferred from North Nova to Central Nova Correctional Institution - "Offender demanded methadone and when told he would receive post-transfer he positioned himself in a fighting stance against staff".

[21] In relation to his substance abuse history, Mr. Gillis stated to Detective Constable Blencowe:

> Like, I tried everything growing up man; like coke, whatever, you name it. And then I moved over to Halifax, I went to the Phoenix shelter, and I met somebody there who was into injecting Dilaudid. Man, I did that, and then I haven't seen a summer in six years [because he was in jail in relation to offences associated with his drug use].

[22] From his statements to police and Pre-sentence Reports, and collateral information, it appears that Mr. Gillis moved out of his mother's home when he was 14-15 years of age (2005), and that this was prompted in part by him being under the influence of a negative peer group. He was in school until his grade 10 academic year at Dartmouth High School in 2005. Since then he has lived on his own.

[23] His substance abuse likely existed by sometime in 2005. He reportedly worked at Kentucky Fried Chicken for three years full-time, and demolition for six months, also having done landscaping and snow removal off and on; he worked for short periods at Wendy's, Burger King and the former Taj Mahal restaurant. He receives disability benefits related to his past abuse of illicit drugs, when not incarcerated.

[24] He continues to have the support of his mother, but still has a very distant relationship and irregular contact with his father and older brother Devon. He had been very close to his mother's mother. She passed away April 15, 2017, when he was in custody. Therefore, he was unable to attend her funeral service.

[25] While Mr. Gillis is a young man, and he showed early signs of remorse, his prospects for rehabilitation are neutral.

[26] I say this because, in my review of the three statements he provided to police officers, I found he presented as a smart, and at times empathetic young man. However, particularly noticeable during his conversations with the undercover police officer, was how quickly he fell into a pattern of bravado, and criminal sub-culture thinking. Moreover, his sustained exposure to illegal drugs and that sub-culture, including the institutional settings of prison, create obstacles to his rehabilitation. At present, and likely when he emerges from incarceration, his support system in the community is/will be limited.

[27] I believe he has the understanding and basic means to turn his life around, but without a sustained genuine effort by him, particularly while incarcerated, he will remain a significant risk to re-offend.

Victim impact statements

[28] I have read them to myself, and heard them read in court. They are profoundly sad victim impact statements.

[29] Dillon Fitzgerald is Mr. Clothier's brother. He called news of Blaine's death "the most devastating news in my lifetime". There will be no more brotherly advice, no get-togethers, no sharing of milestones. He added that "what makes this crime more difficult is the fact of Blaine's life was taken by somebody we all thought was his friend".

[30] Tracey Clothier is Mr. Clothier's aunt. She summed it up: "we are all left with a very empty hole in our hearts… We all have to live on and try to remember all the great things that Blaine has done in his life"

[31] Cherie Clothier is Blaine's mother. She stated in part:

> On March 2, 2016, my heart was broken… I immediately dropped to the floor asking "why?" My next thought was my poor grand-daughter. How do you tell a six-year-old her daddy was gone and not coming back?... Blaine will never be able to watch her grow up and give her the love she deserves from her father… The pain is so real when I sit and remember all the memories of him. It breaks me inside. We are not supposed to bury our children. All because of a senseless crime and a brutal death, knowing my son took his last breath alone.

The range of sentences for manslaughter

[32] The maximum penalty for manslaughter is life imprisonment.

[33] However, in reality, the circumstances amounting to manslaughter can be characterized as lying on a spectrum from least serious to most serious – namely from "near accident", up to the higher end "near murder", circumstances. Therefore, the appropriate range of sentences for manslaughters also covers a spectrum from least serious to most serious – namely from a sentence of probation in extremely rare cases, to sentences approaching 20 years in prison.[4]

Position of the Crown

[34] The Crown argues for a 13 year sentence. It cites the following aggravating factors as the reason for a sentence closer to circumstances of "near murder":

1. This was an unprovoked attack against Mr. Clothier;
2. Mr. Gillis obtained and subsequently used a knife in his attack on Mr. Clothier;
3. Mr. Clothier was unarmed;
4. There was a total of four stab wounds inflicted by Mr. Gillis to Mr. Clothier;
5. Mr. Gillis has a lengthy criminal record, including a number of violent offences;
6. Mr. Gillis had just been released from custody in December [2015];
7. Mr. Gillis was on probation at the time of this offence for an "assault causing bodily harm" charge; and
8. Mr. Gillis left the apartment after stabbing Mr. Clothier without seeking medical attention for Mr. Clothier.

[35] The Crown cites the following cases in support of its position:

1. *R. v. Henry*, 2001 NSCA 33 (for general principles of law);
2. *R. v. Landry*, 2016 NSCA 53 (14 years jail);
3. *R. v. White*, 2013 NSSC 323 (12 years jail);
4. *R. v. Medwid*, [2009] O.J. No. 1992 (SC), (11 years jail);

[4] See *R. v. LM*, 2008 SCC 31, regarding when the maximum life imprisonment sentence should be considered as appropriate. Most sentencings for manslaughter involve sentences between four and ten years in jail.

5. *R. v. Docherty*, [2010] O.J. No. 2728 (SC), (12 years jail);
6. *R. v. Cleyndert*, [2006] O.J. No. 4038 (CA), (12 years jail); and
7. *R. v. Louati*, 2016 QCCS 5569, (11 years jail).

[36] In its oral argument the Crown stated that, "what sets him apart [from other manslaughter sentencings involving the same facts as we have here] is his [criminal] record". The Crown characterizes it as "ongoing and violent".

[37] The Crown also argues that Mr. Gillis should only obtain a 1 to 1 pre-sentence remand credit for the time he has been in custody awaiting his trial. They argue that his misbehaviour during his remand time defeats his claim for an enhanced presentence remand credit of 1.5 days for each day in custody to date.

[38] Not in dispute, the Crown seeks a so-called DNA order against Mr. Gillis pursuant to Section 487.051, and a firearms, explosives, and ammunition prohibition order pursuant to Section 109(1)(a) and 109(3) Criminal Code, during Mr. Gillis's lifetime.

Mr. Gillis's position

[39] Mr. Gillis argues that a 7 year sentence is a proper sentence here. He argues that for the 699 days he has been in custody since March 2, 2016, he should receive, based on a multiplier of 1.5 days for every day served, 1048 days presentence credit, such that he would have remaining 1507 days to serve.

[40] He disagrees with what the Crown says are aggravating facts. He says that a strict reading of the ASF does not prove that:

1. It was an unprovoked and savage attack by him on Mr. Clothier;
2. Mr. Gillis obtained the knife from the kitchen;
3. That Mr. Gillis stabbed Mr. Clothier four times – he says that the mere reference to" four superficial wounds" in the ASF does not necessarily imply they were made by the knife.

[41] On the other hand, in mitigation, he says it has been proved that:

1. Elements of the intoxication of Mr. Gillis, and provocation by Mr. Clothier, are clearly to be inferred from the facts, and explain why Mr. Gillis did not have the intention to kill Mr. Clothier;

2. When Mr. Gillis left, he had no appreciation of the severity of the injuries to Mr. Clothier, and was aware that S. was still present in the apartment, and believed that she would seek medical attention if the situation required it.

[42] Mr. Gillis says the mitigating factors to be considered by the court include:

1. He pled guilty at the first possible opportunity;
2. At 27 years of age he is a relatively youthful offender;
3. He is genuinely remorseful and the evidence shows remorse immediately;
4. He accepts responsibility and is insightful as to the effects of his actions on others;
5. He has plans to better himself and cease offending behaviour;
6. He recognizes his severe addiction problems and has repeatedly attempted to conquer them.

[43] Mr. Gillis relies specifically on the following cases:

1. *R. v. MacNeil*, 2009 NSSC 310, per MacDonald (SJ)J (7 years jail);
2. *R. v. Burgess*, 2016 NSPC 1, per Derrick PCJ (as she then was), (4 years jail);
3. *R. v. Francis*, 2007 NSSC 184, per Warner J, (7 years jail);
4. And in relation to his argument that he reached should receive an enhanced pre-sentence custody remand credit – *R. v. Perry*, 2018 NSSC 16, per Wood J.

The application of the principles of sentencing to the circumstances of this case

[44] I have previously examined the general sentencing principles relevant to manslaughter in: *R. v. White*, 2013 NSSC 323 (12 years jail – although that was a joint recommendation, which reduces its precedential value); *R. v. Denny*, 2016 NSSC 76 (8 years jail); and *R. v. Downey*, 2017 NSSC 302 (4 years jail).

[45] As I stated in *Downey*:

> 18 I am keeping in mind the principles of sentencing in Sections 718 - 718.2 of the Criminal Code.

19 In sentencings, courts are trying to fundamentally 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 others 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 acknowledgement of the harm done to victims or to the community.

20 Fundamentally, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Moral responsibility or blameworthiness is the barometer of punishment in such cases. More blameworthy conduct generally sees a more severe sentence imposed.

21 In *CAM*, [1996] 1 S.C.R. 500, Chief Justice Lamer speaking for the Supreme Court of Canada confirmed that the notion of retribution is appropriate in sentencings because it incorporates a principle of reasoned restraint -- retribution requires the imposition of a just and appropriate punishment and nothing more. It is based on the intentional risk-taking of the offender and the consequential harm caused by the offender as well as the normative character of the offender's conduct. It is distinguishable, therefore, from vengeance.

22 The court must also consider factors that aggravate/tend to increase or mitigate/tend to reduce the severity of a sentence.

…

27 While I may not have articulated all the relevant factors in this decision, I have carefully considered the submissions made by both Crown and defence counsel here and have taken them into account.

…

33 … As Justice Pugsley remarked in *R. v. McDow* [1996] N.S.J. No. 52, at para. 93:

The sentence imposed by this court should reflect society's recognition of the unique gift of life, and the seriousness with which we view the actions of those who trivialize that gift by taking it from another.

[46] I find the following aggravating and mitigating factors in this case:

Aggravating factors

1. The evidence indicates that during a confrontation between Mr. Gillis and Mr. Clothier, Mr. Gillis brandished a knife, described as a "kitchen knife". I find that Mr. Gillis did not bring the knife to the apartment- however the knife was at the apartment. Mr. Gillis armed himself with it before the confrontation with Mr. Clothier. Mr. Clothier was unarmed. Mr. Gillis was the aggressor. It is a significant aggravating factor that Mr. Gillis armed himself with the knife;
2. I interpret the Crown's statement that the attack on Mr. Clothier was "unprovoked", as meaning Mr. Gillis initiated the confrontation. The use of the descriptors "unprovoked" and "provocation" allow for too much ambiguity in my opinion. Conversely, to establish provocation by Mr. Clothier as a mitigating factor, the defence has the onus on a balance of probabilities. There is no evidence that there was a legally accepted and significant provocation by Mr. Clothier. The fact that Mr. Gillis did not like how Mr. Clothier was treating S., in these circumstances, cannot at law constitute provocation and reduce Mr. Gillis's culpability;
3. Earlier I stated that I accepted Mr. Gillis acted against Mr. Clothier, because of his perceived exploitation of the vulnerable S. As in *Henry*, at para.23, "what lay behind his attack was an anger that he chose not to control. Additionally, it would appear that at least part of his motivation was a desire to impress that woman.";
4. I find that the four superficial wounds to the upper body of Mr. Clothier were inflicted as a result of Mr. Gillis's use of the knife, though perhaps not by stabbing at Mr. Clothier - Nevertheless Mr. Gillis alone bears responsibility for them; [5]
5. When Mr. Gillis left the apartment, he was well aware that Mr. Clothier was in immediate need of medical assistance, but did not call 911, or otherwise provide such assistance for Mr. Clothier;
6. The fact that Mr. Gillis stabbed Mr. Clothier in the torso, an area that is well known to contain many sensitive organs and arteries;

[5] By law, I must accept the agreed to facts set out in an Agreed Statement of Facts. As a consequence, it is so important that the written description of facts therein must be: clear, unambiguous, precise and unequivocal – *R. v. Asp*, 2011 BCCA 433 at para 40; *R. v. Falconer*, 2016 NSCA 22.

7. The fact that Mr. Gillis stabbed Mr. Clothier in what was at that time his home (*R. v. Clarke*, [2003] OJ No 1966 (CA));

8. The fact that Mr. Gillis had a prior record in relation to:

    a. A knife - Section 90(1) sentencing August 26, 2010 – 30 days custody +9 months probation and forfeiture of the knife pursuant to Section 491;

    b. As a party to the use of an axe as a weapon during a robbery - Section 344 sentencing March 9, 2012 – 10 months custody +2 years probation;

    c. Mr. Gillis had just been released from custody in December 2015;

    d. Mr. Gillis was on probation from the assault causing bodily harm offence (having received effectively a 10 month sentence +2 years probation on August 25, 2015);

    e. Mr. Gillis was on probation for one year as a result of his 40 day intermittent jail sentence March 16, 2015;

    f. Mr. Gillis was on probation for 24 months as a result of his 55 day jail sentence January 16, 2014;

9. Mr. Gillis has a substantial and sustained criminal record;

10. The impact of the loss of Mr. Clothier on his family and friends (notably aggravating is that Mr. Gillis knew that Mr. Clothier was father to a six-year-old daughter, who has had no contact with her mother since not long after she was born – she therefore had no other parent than Mr. Clothier).

Mitigating factors

1. While Mr. Gillis did plead guilty on January 8, 2018, it was shortly after he had been made aware that all three of his statements made to police and the undercover officer would be admissible at his trial against him;
2. As an expression of remorse, the lateness of a guilty plea substantially erodes an accused's claim to the benefit of such potential mitigation *(R. v. Lacasse,,* 2015 SCC 64, at para. 81); Mr. Gillis's guilty plea,

while still worthy of consideration, came at a time almost 2 years after the offence, which did not spare the victims and witnesses the intervening anxiety, or allow his rehabilitation to begin in earnest. However, I accept that, Mr. Gillis recognized in his March 2 –3, 2016 statements to police that he was likely guilty of manslaughter, and as his counsel has represented, he offered to plead guilty to manslaughter quite early in the process. Mr. Gillis is still a relatively youthful offender, and the court should not without good reason under-estimate his potential for rehabilitation. His statement to the court, and to the family of Blaine Clothier today, appeared genuine and remorseful. However, often in the past, Mr. Gillis had been given numerous opportunities on probation to rehabilitate himself;

3. Intoxication is not generally, or on the facts of this case, a mitigating factor; [6]

4. I am not satisfied that provocation, as defined by Section 232, was a factor in causing the Crown to accept a guilty plea to manslaughter. Moreover provocation has not been established by Mr. Gillis. . There is neither direct evidence of provocative behaviour by Mr. Clothier immediately preceding Mr. Gillis's stabbing him, nor do I infer such behaviour. At this juncture, I believe it useful to examine what is the state of the law regarding "provocation" as a possible mitigating factor in manslaughter sentencings.

[47] I question whether ordinary or mere provocative behaviour by a victim could reduce moral blameworthiness for criminal conduct on such sentencings.

[48] In my view, it is important to address whether such claimed "mere provocation", as opposed to Section 232 Criminal Code or the similar historical common law requirements for provocation, should be permitted as a mitigating factor in sentencings of the offenders who commit manslaughter.

[49] The moral blameworthiness of offenders in committing the offence is the fundamental basis upon which courts assess what is a proportionate sentence, and what should be mitigating and aggravating factors on sentence. What conduct should be considered as mitigating on sentencing – generalized provocative conduct, which I reference as "mere" or "ordinary" provocation; or a more precisely defined provocative conduct, akin to the "defence of provocation"

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[6] *R. v. Gregory*, 2013 NSCA 102, at paras. 16 – 23; *R. v. Dunn*, (2002) 156 OAC 27 at para 34; *R v RRF*, 2008 SKCA 52, at para 10; and Justice Moldaver's comments in *R. v. Tatton*, 2015 SCC 33, at paras 43 – 45.

(Section 232 Criminal Code or as defined by the historical common law provocation criteria).

[50] Both murder and manslaughter are forms of culpable homicide – Section 222(4) Criminal Code.

[51] From the Supreme Court's reasons in *Stone*, it can be inferred that *only* provocative behaviour by a victim satisfying the "defence of provocation" (Section 232) criteria, should be capable of mitigating a sentence in cases of manslaughter (as in that case, which have already been reduced from murder by the defence of provocation). Arguably, for manslaughters otherwise (i.e. not reduced to manslaughter by the defence of provocation), only by proof of the "defence of provocation" statutory criteria (or the historical common law criteria perhaps) should provocation operate as a mitigating factor.

[52] To constitute the "defence of provocation", statutory provocation requires that the conduct of the victim "would constitute an indictable offence punishable by five or more years imprisonment and is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control,… if the accused acted on it on the sudden and before there was time for their passion to cool".

[53] There may be an argument that, in manslaughter (not reduced from murder by provocation) sentencings, the historical common law criteria represent more appropriate factors: Did the accused lose self-control as a result of the act or acts of the deceased? and was the provoking act capable of depriving a reasonable man or ordinary person of their self-control?

[54] Should not an offender being sentenced for manslaughter be responsible for the full extent of their criminal behavior underlying the offence, unless such behavior could not *reasonably* have been restrained by them? Only a strict application of the statutory, or historical common law, provocation criteria would ensure this.

[55] In discussing what is "moral blameworthiness," Justice Lebel in *R. v. Ruzic*, [2001] 1 S.C.R. 687, stated that:

> The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law… Criminal liability also depends on the capacity to choose – the ability to reason right from wrong. As McLachlin J observed in *Chaulk*, [1990] 3 S.C.R. 1303...

> 'At the heart of our criminal law system is the cardinal assumption that human beings are rational and autonomous… Individuals have the capacity to reason right from wrong, and thus choose between right and wrong. Ferguson continues (at p. 140): it is these dual capacities – reason and choice – which give moral justification to imposing criminal responsibility and punishment on offenders. If a person can reason right from wrong and has the ability to choose right or wrong, then attribution of or responsibility and punishment is morally justified or deserved when that person consciously chooses wrong.'

[56] Only because Mr. Gillis specifically cited the *Burgess* case, do I turn to it to examine the jurisprudential support for mere or ordinary provocation to operate as a mitigating factor on (not reduced from murder by provocation) manslaughter sentencings.

[57] Mr. Gillis argued *Burgess* as containing authority for Judge Derrick's statements at paras. 76-80, (citing Justice Wright's decision in *R. v. Tower*, 2007 NSSC 60, and *R. v. Simcoe*, [2002] O.J. No. 884 (CA)), that "the provocation that can be taken into account at sentencing does *not* have to satisfy the criteria for the defence of provocation which may be invoked against a charge of murder".

[58] While Judge Derrick (as she then was) notes that there appears to be jurisprudential support therefor, as a broad proposition, I believe it is dangerous to accept ordinary or mere provocative behaviour as a mitigating factor on sentences involving manslaughter.

[59] I realize that where a murder charge has been reduced to manslaughter by virtue of Section 232 Criminal Code - see *R. v. Stone*, [1999] 2 S.C.R. 290 - such provocation can be double counted – i.e. reduce murder to manslaughter, and still be available as a mitigating factor on sentence.

[60] I expect that the Supreme Court would endorse the notion that where the "defence of provocation" requirements of Section 232 Criminal Code (or possibly the historical common law criteria) have been established in cases of manslaughter (not reduced by provocation from murder), such provocation could constitute a mitigating factor on sentence in those cases of manslaughter. But would it accept acts of claimed provocation that do not meet the statutory or historical common law criteria, as capable of mitigating sentence in such manslaughter cases? I do not believe so.

[61] I say this because, with great respect to those that think otherwise: the jurisprudential support for accepting ordinary provocative behavior as a mitigating factor on sentencing is unpersuasive; and without strict requirements such as those

contained in Section 232 (or the historical common law criteria), such mitigation on sentencings inappropriately rewards offenders, and comes uncomfortably close to being seen as subjectively concluding the victim "had it coming"- and encouraging vengeance based violent excesses.

[62] While sentencing judges must examine all the circumstances surrounding the offence and seek to understand the motivation for the accused's conduct, which may include words or acts emanating from the victim, I believe it is not appropriate to loosely use the word "provocation" as a catch-all descriptor for such conduct.

[63] Conduct or words by the victim, short of at least satisfying the historical requirements for the "defence of provocation", should not reduce an offender's moral blameworthiness. [7]

[64] Let me briefly then review some of the relevant jurisprudence to see if it provides persuasive bases for using mere provocation as mitigating factor on manslaughter sentencings.

[65] In *Tower*, [8] Justice Wright imposed a five-year sentence for Mr. Tower. He had confronted an intoxicated, obnoxious, and belligerent victim who was disturbing the neighbourhood's peace, and forcefully struck him twice with a long handled pruning shears across the back using a baseball style swing. The victim did not go to the hospital, and died two days later as a result of massive internal bleeding from a ruptured spleen, which was injured when his ninth and tenth left ribs were fractured by the pruning shears' blows.

[66] In assessing the moral blameworthiness of Mr. Tower, Justice Wright stated:

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[7]Which are now embodied in Section 232 Criminal Code regarding murder/manslaughter-however, it should be noted that these developed initially at common law-see McLachlin CJ's reasons in *R. v. Cairney*, 2013 SCC 55 at paras. 24-26: "At common law, as under Section 232 of the *Criminal Code*, the defence of provocation consists of two elements -- one subjective and one objective. *Historically, the first requirement was that the accused have lost self-control as a result of the act or acts of the deceased*. This was called the subjective element; the issue was simply whether the accused in fact (i.e. subjectively) lost his self-control as a result of the deceased's acts. *The second requirement*, which emerged progressively as a means of limiting the availability of the defence, *was that the provoking act be capable of depriving a reasonable man (or ordinary person) of his self-control*. This was called the objective element."

[8] On appeal, both conviction and sentence were upheld. At paras. 70,77 and 78, Justice Cromwell (as he then was) stated: "the judge rejected the appellant's contention that any provocation by the deceased should be considered as a mitigating factor or that the deceased's failure to seek medical attention reduced the level of the appellant's moral blameworthiness… The judge in this case correctly instructed himself on the principles of sentencing… He inflicted life-threatening injuries with a weapon while the victim turned away… The appellant's conduct combined vigilantism, bravado and brutality."

> 35 The court must also in turn examine any other mitigating factors that may bear upon the appropriate range of sentencing. *Defence counsel submits that provocation is one such factor here, arguing in effect that Mr. Tower's degree of responsibility or blameworthiness is thereby diminished.* The argument is made that the acts of Mr. Grismajer in disturbing the neighbourhood with his intoxicated rants, and the throwing of a beer bottle at Mr. Tower (according to the sole evidence of Mr. Godin), constitutes provocation that should be considered as a mitigating factor.
>
> 36 *While I recognize the principle*, I do not think it has any application on the facts of this case. Mr. Grismajer was undoubtedly an annoying presence in the neighbourhood, but *his intoxicated and confrontational rants were not sufficient to cause Mr. Tower to lose control in the situation or to constitute provocation in any sense recognized by law*. Whether Mr. Grismajer threw a bottle towards Mr. Tower or not would not change my conclusion in this regard.

[67] Thus, arguably Justice Wright recognized mere provocation as potentially applicable as a mitigating factor on sentencing, but not so on the facts of that case. Justice Wright gave no express jurisprudential basis for his conclusion, however he cited *R. v. Henry*, 2002 NSCA 33.

[68] Does *Henry* provide that jurisprudential basis? I conclude that it does not.

[69] Therein, Justice Roscoe referred to mitigating factors:

> 20 Examples of strong mitigating factors that have influenced courts to be lenient in the imposition of sentence in manslaughter cases are:
>
> - long term abuse of accused by victim:
>
> *R. v. Dunlap* (1991), 101 N.S.R. (2d) 263 (C.A.) - 1 year
>
> R. v. Drake, [1995] O.J. No. 4375 (Gen. Div.), online: Quicklaw (OJ) - suspended sentence
>
> *R. v. Cormier* (1974), 9 N.S.R. (2d) 687 (S.C.(A.D.)) - suspended sentence
>
> - battered woman syndrome:
>
> *R. v. Phillips*, [1992] O.J. No. 2716 (Gen. Div.), online: Quicklaw (OJ) - 2 years less a day
>
> *R. v. Bennett*, [1993] O.J. No. 1011 (Prov. Div.), online: Quicklaw (OJ) - suspended sentence
>
> - impulsive act or immediate reaction to perceived or actual wrong by victim:
>
> *R. v. Kipling* (1992), 83 Man. R (2d) 6 R. (2d) 6 – 2 years less a day

R. v. McLeod (L.S.) (1994), 132 N.S.R. (2d) 118 (C.A.) - 4 years

R. v. Whynot (1996), 147 N.S.R. (2d) 111 (C.A.) - 5 year

- mental illness of accused:

R. v. Johnstone (1980), 38 N.S.R. (2d) 313 (Prov.Ct.) - 18 months

R. v. Valiquette (1990), 60 C.C.C. (3d) 325 (Qc.C.A.) - suspended sentence

- extreme stress or provocation:

R. v. Hardy (1976), 29 C.C.C. (2d) 84 (QC.Sup.Ct.) - suspended sentence

R. v. Stone, [1999] 2 S.C.R. 290 (S.C.C.) - 7 years (4 years plus 18 months pre-trial custody)

[70] Most relevant here are the categories cited as "impulsive act or immediate reaction to perceived or actual wrong by victim", and "extreme stress or provocation".

i) The examples of impulsive act or immediate reaction to perceived or actual wrong by victim

[71] The facts in *Kipling*, were scant: "the circumstances of the offence are tragic – the accused took the life of his brother (with whom he was usually on the best of terms) during a drunken dispute over a trivial matter". The court increased the sentence to two years less one day custody with three years probation.

[72] In the trial decision, [1992] MJ No. 486 (PC), Judge Allen notes that after the preliminary inquiry hearing, the Crown laid a new charge of manslaughter, to which Mr. Kipling pled guilty. The judge described the circumstances of Mr. Kipling's actions as:

> … The deceased got the accused in a prone position on a bed in the suite and was striking him when the accused produced a knife, stabbed the deceased in the chest area. The wound was fatal… it can be seen as an impetuous move made in the heat of the moment. There was no forethought whatsoever and the circumstances could be described as close to self-defence. There is little doubt that the deceased was the aggressor. The accused crime consisted of excessive retaliation".

[73] In *R. v. LSM*, (1994) 132 NSR (2d) 118, [1994] NSJ No. 295 (CA), the court considered "whether four years incarceration is a fit punishment for a 21-year-old accused who pleaded guilty to manslaughter after beating to death a man who had just engaged him in a [un-consented to anal intercourse] homosexual act." Mr. M

was charged with murder, but pled guilty to manslaughter after the preliminary inquiry, and was sentenced to effectively a five year sentence, after credit for remand time.

[74] Justice Freeman went on to say, that [the trial judge, Justice Hall], "considered that provocation was the overriding factor in mitigation of sentence"… "By sodomizing [the victim], [the deceased] robbed him of his ability to control the violent fury that resulted in his own death", and allowed for the application of Section 232 reducing murder to manslaughter.

[75] Justice Freeman upheld the sentence, and noted: "Deterrence is always a major factor in crimes of violence, but it is most effective when there is an element of deliberation, not when the offence is one committed by a person beyond the reach of reason."

[76] In *R. v. Whynot*, (1996) 147 NSR (2d) 111, [1996] NSJ No 12, (CA), Ms. Whynot, who had been charged with second-degree murder arising out of the stabbing death of her husband, after preliminary inquiry and during a resolution conference, pled guilty to manslaughter. ACJ Palmeter sentenced her to five years custody, which sentence was upheld on appeal.

[77] The Agreed Statement of Facts included that:

> When Ms. Whynot arrived home she found the door to her apartment locked. She pounded on the door and windows until [her husband] let her in. They started arguing and she went upstairs and changed into her nightdress. When she came back down, they started arguing again which escalated into a physical fight"… "[The fatal wound in the chest] was consistent with the accused's statement that the victim had come at the accused with the kitchen knife and that they had struggled with the knife raised over their heads and the knife had been driven into the victim while it was still in both of their hands.

[78] The trial judge's reasons included:

> The bottom line is that the deceased was killed by his wife, by being stabbed by a knife after both parties had been out drinking and in the middle of an argument. The evidence before me does not indicate any justification for this homicide, although there is some suggestion of some provocation and some indication of some sort of self-defence, short, certainly to allow an acquittal for the charge of either second-degree murder or manslaughter… There is no evidence before me, or any that I accept, that the offender has suffered from the 'battered wife syndrome'…"

[79] The trial judge did consider the act to be spontaneous and "out of character".

[80] In summary, *Kipling* and *Whynot* do not support mere provocation as a mitigating factor, although they did involve relatively immediate responses to actions by the deceased persons. In *LSM*, the court found provocation as defined in Section 232 Criminal Code. Therefore, not one of them is an example of mere provocation being a mitigating factor on sentence.

ii) *Examples of extreme stress or provocation*

[81] In *R. v. Hardy*, (1976), 29 CCC (2d) 84 (Que Sup Ct), the offender beat his spouse to death. He was charged with murder, but pled guilty to manslaughter. The circumstances were recounted in a brief decision:

> 11 I do not intend to repeat here the vicissitudes of their lives together nor to count all the doctors and all the hospitals who tried in vain to help the victim. Let me say that the mental condition of the victim deteriorated to the extent that about two months before her death "she became physically violent hitting him and clawing at him".
>
> 12 She would refuse to go home and then telephone for him to get her. The night before the incident they went to have dinner at a restaurant. She interrupted the meal to telephone one of her four gynecologists to inform him she was "abortive". She was taken to the R.V.H. by the accused, examined and told to go home. She insisted to go for a drink and when she finally got home she continued to abuse him and announced she was going to stay at the Y.W.C.A. He let her go but went to bed fully clothed after having called the Y.W.C.A. and having told them to give her a room even if she did not have the money for it and that he would pay. He gave his name and address.
>
> 13 At 2:00 a.m. she telephoned from the Motel Pierre, said (for the hundredth time) she was sorry and would he come and get her - he did.
>
> > "On the way home she was quite docile but again on entering the apartment she started to accuse him of having someone in during the relatively short time she had been away. (He) begged her to calm down and finally at 5:00 a.m. she said why don't you come and lie beside me? Although (he) was still clothed, (he) got in beside her and fell asleep with (his) arm around her. At about seven she woke up and shouted 'get out of my bed you nigger lover', pushing (him) with her foot. (He) sprang out, rushed over to the closet where (he) had a basket with a few tools stored, grabbed the hammer and began striking her. It seemed as if (he) was smashing away some sort of trap (he) was in. (He) then, still in a rage, grabbed a pillow and had it over her face. When she was still (he) sat on the edge of (his) own bed wondering how it could have happened."
>
> 14 It appears from the evidence before me that the accused loved his wife very much and cared for her in a way no one is expected to care for a spouse in the

> same circumstances. The persons who could be most interested in vindicating the victim, her immediate family, including her own mother, request "minimum... sentence permissible in the case.

[82] The Crown made no sentencing recommendation. The court agreed to the defence request for a three year suspended sentence. It would appear that this was a situation in which the statutory defence of provocation was in play.

[83] *R. v. Stone*, [1999] 2 S.C.R. 290, involved "automatism, and more specifically "psychological blow" automatism. Mr. Stone claimed nothing more than his wife's words caused him to enter into an automatistic state in which his actions, which included stabbing his wife 47 times, were involuntary."

[84] The facts were recited by Justice Bastarache for the majority:

> 102 The appellant was charged with the murder of his wife, Donna Stone. At trial, the appellant admitted killing his wife. In his defence, the appellant claimed: insane automatism, non-insane automatism, lack of intent, and alternatively, provocation.
>
> 103 The appellant met Donna Stone in the spring of 1993 and the two were married on May 8, 1993. They lived in Winfield, British Columbia, in the Okanagan Valley. This was the appellant's third marriage. He has two teenaged sons from his second marriage. His sons live with their mother in Surrey, British Columbia, a suburb of Vancouver.
>
> 104 In March 1994, the appellant planned a business trip to Vancouver. He decided to visit his sons while in the Vancouver area. He contacted his second wife and made arrangements to take his sons out for dinner and a movie. The appellant did not tell Donna Stone of his intention to travel to Vancouver and visit his sons because she did not get along with them.
>
> 105 According to the appellant, Donna Stone learned of his intention to go to Vancouver. She demanded to go along with him and said she would follow him in another vehicle if he did not take her. The appellant agreed to take her with him to Vancouver.
>
> 106 The appellant testified that Donna Stone berated him throughout the drive to Vancouver and objected to his visit with his sons. Nevertheless, the appellant drove to the home of his second wife for the planned visit with his sons. The visit lasted only 15 minutes because Donna Stone threatened to "lay on the horn until the police come".
>
> 107 The appellant testified that after the brief visit with his sons, he and Donna Stone drove towards Vancouver. According to the appellant, Donna Stone asked him if he wanted a divorce. He responded that they might as well get divorced if she was not going to let him see his sons. This answer upset the victim and she again began to berate the appellant.

> 108 The appellant testified that he pulled into an empty lot and turned off the truck's engine while Donna Stone continued to yell at him:
>
> > ... I sat there with my head down while she's still yelling at me that I'm nothing but a piece of shit and that when she had talked to the police, that she had told them lies, that I was abusing her, and that they were getting all the paperwork ready to have me arrested, and that all she had to do was phone them; and once they had me arrested, that she was going to get a court order so that I wouldn't be allowed back onto our property and that I would have to go and live with my mother and run my business from there, that she was going to quit working and she was just going to stay in the house with her children and that I would have to pay her alimony and child support.
> >
> > ... Well, she just continued on and she just said that she couldn't stand to listen to me whistle, that every time I touched her, she felt sick, that I was a lousy fuck and that I had a little penis and that she's never going to fuck me again, and I'm just sitting there with my head down; and by this time, she's kneeling on the seat and she's yelling this in my face. ...
>
> 109 The appellant testified that the victim's voice began to fade off. He recalls wondering why she was treating him and his children in this way. He also remembers thinking about how people in the small town in which he lived would look at him if his wife had him arrested. The appellant then remembers a "whoosh" sensation washing over him from his feet to his head. According to the appellant, when his eyes focussed again, he was staring straight ahead and felt something in his hand. He was holding a six-inch hunting knife which he kept in the truck. He looked over and saw Donna Stone slumped over on the seat. He knew she was dead. It would later be determined that Donna Stone died from loss of blood resulting from 47 stab wounds.

[85] In *Stone*, the majority agreed that the sentencing judge was entitled to consider provocation as a mitigating factor for manslaughter, where the same provocation, through the operation of Section 232 of the Code had already reduced the offence from murder to manslaughter.

[86] However, with the greatest of respect, I do not read the majority's reasons at paras. 232 – 248 as supporting Judge Derrick's conclusion in *Burgess* at para. 78-79:

> Provocation
>
> 76 A factor I have not yet addressed is provocation. The moral culpability assessment includes, as I noted earlier in these reasons, consideration of "what, if anything, provoked the act." (*R. v. Tower, paragraph 30*)
>
> 77 In Ms. MacKay's submission, provocation is not a factor that should be taken into account in this case. At the sentencing hearing she submitted that

"Verbal abuse does not rise to the level of legal provocation to operate as a mitigating factor." By "legal provocation" I believe Ms. MacKay means the provocation that could reduce what was charged as murder to a conviction for manslaughter.

78 *I find the provocation that can be taken into account at sentencing does not have to satisfy the criteria for the defence of provocation which may be invoked against a charge of murder.* Consideration for the moral culpability assessment of "what, if anything, provoked the act" was given in *R. v. Tower*, a decision of Wright, J. of the Nova Scotia Supreme Court. In his consideration of what provoked Mr. Tower's assault of the victim, Wright, J. reiterated a passage from the decision in *R. v. Laberge* of the Alberta Court of Appeal (*R. v. K.K.L., [1995] A.J. No. 434, paragraph 23*), which was cited with approval by the Supreme Court of Canada in *R. v. Stone*, [1999] S.C.J. No. 27, at paragraph 247. In *Stone*, the Supreme Court held: "In reaching a sentence which accurately reflects a particular offender's moral culpability, the sentencing judge must consider all the circumstances of the offence, including whether it involved provocation..." (*paragraph 234*)

79 In a case provided by the Defence, *R. v. Simcoe*, [2002] O.J. No. 884, a manslaughter sentencing, the Ontario Court of Appeal held that "where the existence of clearly provocative conduct affects the moral culpability of [the offender], that conduct can and should be taken into account when considering the appropriate sentence." (*paragraph 17*) That is consistent with the Supreme Court of Canada's determination in *Stone*, a second degree murder prosecution where the defence of provocation had been accepted by the jury with the result that they returned a verdict of manslaughter. *There is nothing in Stone that limits the application of facts relating to provocation to cases where murder has been reduced to manslaughter.* (And I note, there is no indication in *Simcoe* that it was charged as a murder case and "pled out" as manslaughter.)

80 *Provocation is relevant to an offender's state of mind and is considered in mitigation of sentences in cases where an unlawful assault does not result in death.* It is relevant to Ms. Burgess' state of mind that when she pushed her father, as I have already said, his verbal abuse and their arguing caused her to react in "a momentary surge of anger and frustration."

81 I found on the trial evidence that Mr. Burgess was intoxicated and verbally abusive prior to being pushed. There was an argument underway between him and Ms. Burgess. (*R. v. Burgess, paragraph 295*) Ms. Burgess should have left him alone, as she had been doing earlier. She should have left the house or called a friend to come and get her. She should not have given in to her anger and frustration. She should not have resorted to violence. However, the evidence established that Ms. Burgess' violent reaction did not come out of the blue. In no way was she justified in reacting to Mr. Burgess violently, but sentencing her must take into account the context in which she shoved him and her state of mind at the time of doing so.

[Italics added]

[87] At paragraphs 234, 237 and 248 in *Stone*, the majority stated:

> 234 In reaching a sentence which accurately reflects a particular offender's moral culpability, the sentencing judge must consider all of the circumstances of the offence, including whether it involved provocation. *Indeed, I agree with Finch J.A. in the court below, that to ignore the defence of provocation accepted by the jury, and the evidence upon which that defence was based, would be to ignore probative evidence of an offender's mental state at the time of the killing.*
>
> …
>
> 237 It follows that an accused does not gain a "double benefit" if provocation is considered in sentencing after a verdict of manslaughter has been rendered by operation of s. 232. Rather, s. 232 provides an accused with a single benefit which can be characterized as a reduction of a verdict of murder to one of manslaughter in order to allow for the consideration of the provoked nature of the killing in the determination of an appropriate sentence. *Accordingly, to give s. 232 full effect, provocation must be considered in sentencing in cases where this section of the Code has been invoked. The sentencing judge was therefore correct in considering provocation as a mitigating factor in the present case.* The argument that the provocation factor was spent because it had already served to reduce the legal character of the crime overlooks the purpose of s. 232 and therefore must fail.
>
> …
>
> 248 It is clear that provocation is merely one of numerous factors which will be considered in the assessment of an appropriate sentence for manslaughter pursuant to s. 232. It therefore cannot be said that cases involving provocation will always involve findings of insignificant moral culpability or that low range sentences can be attributed solely to the provocation factor.

[88] In summary, I conclude there is unpersuasive jurisprudential support for the proposition that mere or ordinary provocation can constitute a mitigating factor on sentence in cases of manslaughter.

[89] In cases of murder, reduced by virtue of s. 232 provocation to manslaughter, *or* where those (or at least the historical common law) requirements are met otherwise in manslaughter convictions/guilty pleas, such provocation is a mitigating factor on sentencing of a manslaughter.

[90] However, in manslaughter cases generally, mere or ordinary “provocation”, should not be a mitigating factor on sentence.

A brief review of the cases

[91] Mr. Gillis relies upon the *MacNeil, Burgess and Francis* decisions.

[92] The *Burgess* decision is distinguishable. On July 20, 2011, his daughter, while sober, "in a momentary surge of anger and frustration…committed the objectively dangerous act of [a single act of] shoving her father hard enough that he fell down steep basement stairs at his home... The propelled fall left him with catastrophic head injuries [from which he died]".

[93] While she developed a substance abuse problem when she left home at age 15, by age 20 she overcame that and had been sober for eight years previously. She encountered her father that day, in a "drunken, obnoxious, verbal abuse" state. She "snapped" and lashed out at him. On July 20, she did nothing to ensure her father was checked out for injuries, even though her brother had urged her to call an ambulance." She did not realize her father had been severely injured until later the next day. She told her mother her father had fallen while drunk.

[94] On July 20, her mother was aware and had seen that Mr. Burgess was left at the bottom of the stairs, but also did not call 911 until the late afternoon of the following day, even after Ms. Burgess that morning told her mother the truth about how Mr. Burgess had come to be at the bottom of the stairs. Judge Derrick found that "medical intervention probably would not have changed the outcome, but it would have resulted in Mr. Burgess receiving appropriate care much sooner" and that "stabbing someone or beating them severely is a more objectively dangerous and escalated form of violence than what Ms. Burgess did when she pushed her father."

[95] Ms. Burgess had previous good character and no criminal record.

[96] In both *MacNeil* and *Francis*, the offenders received a seven year sentence for stabbing related manslaughters. MacNeil had a prior record, including "seven common assaults between 1989 and 2004". He had only previously served one "short jail term"; whereas Francis, who is Aboriginal, had a short criminal record, with no prior violent offences.

[97] A seven year sentence for manslaughter, reduced after trial from murder by provocation, was also affirmed in *R. v. Jacobs*, (1989), 93 NSR (2d) 359 (CA). These are each distinguishable from the case before me.

[98] I find Mr. Gillis's case has numerous similarities with the circumstances in *R. v. Reid*, 2012 ONSC 7521, per Fuerst J. [9]

[99] By 14 years of age, he had become an abuser of alcohol and drugs, being addicted to cocaine and crack cocaine as a teenager. He quit school after grade 9 and started working at the age of 16. He had received a suspended sentence with probation for two years as a result of his plea of guilty to assault causing bodily harm.

[100] Mr. Reid pled guilty. He was 23 years old, had a troubled childhood, problems with alcohol abuse, a related criminal record, and on probation for assault causing bodily harm when while intoxicated a disagreement between he and an acquaintance caused a fistfight to break out. Mr. Reid grabbed a steak knife that was at the scene and stabbed the victim once in the stomach. The wound produced only a small amount of blood, and it did not appear to be serious. The pathologist confirmed that the knife penetrated the skin, the abdominal wall, and went into the liver causing internal bleeding into the abdominal cavity.

[101] Mr. Reid did not call for assistance, however very shortly thereafter he told another person who had been present that he had stabbed the victim. He was advised to call an ambulance. The victim was not promptly brought to the attention of emergency health services, and died two hours later. Mr. Reid took steps to hide the evidence of the stabbing. He was charged with second-degree murder, and pleaded guilty to manslaughter after his preliminary inquiry hearing.

[102] Justice Fuerst noted that:

> The various decisions referred to by Crown and defence counsel demonstrate that sentences as low as 6 years and as high as 12 years in jail have been imposed in manslaughter cases where there are factors that significantly aggravate the offence. After weighing all the relevant factors, and having regard to the applicable objectives of sentencing, I conclude that the appropriate sentence falls at neither the bottom nor the top of that range. A sentence closer to the bottom end of the range would not reflect the moral blameworthiness of Mr. Reid's offence, while a sentence closer to the top end of the range would accord insufficient weight to the mitigating factors. (para. 53)

[103] She sentenced Mr. Reid to 8 years in jail.

Conclusion

[9] Somewhat similarly, see *R. v. Coopper*, 2001 BCSC 1051 (8 years in jail); affirmed 2002 BCCA 259.

[104] Regarding the sentencing of Mr. Gillis, I find that the aggravating factors are more profound, and the mitigating factors are less persuasive, than they were in *Reid*, *Francis* or *MacNeil.*

[105] I find the 12-year sentence, jointly recommended, in *R v White,* to be distinguishable as it involves circumstances much closer to the "near murder" characterization of manslaughter – having involved a frenzied attack leaving so many stab wounds that they could not be counted. Mr. White was 27 years old. He had previously been sentenced to two years for robbery, been convicted of assault causing bodily harm, and two simple assaults. He also had a short record for other non-violent Criminal Code offences. His victim was 76 years old, and particularly vulnerable, including having been attacked in his home.

[106] I also find the other cases cited by the Crown to be distinguishable as all being more serious situations of "near murder":

a. In *Medwid,* the defence which sought a range of sentence from 8 to 12 years, acknowledged that, but for the intoxication, his actions would have been a murder, and an 11 year sentence was imposed;

b. In *Docherty*, a 12 year sentence was imposed, where after trial for murder, he was found guilty of manslaughter as a result of a "defence of provocation"-he had a somewhat dated criminal record and was not previously incarcerated – however he armed himself with a knife and knowingly walked into what he expected would be a confrontation with the victim, and then stabbed the victim in the throat at least seven times;

c. In *Cleyndert*, a 12 year sentence was upheld, where a 19-year old with no adult record was convicted of manslaughter following trial on a charge of second-degree murder – while the victim expected a fistfight, using a concealed prohibited weapon, a butterfly knife, Cleyndert stabbed the victim eight times in the torso leading to his death, which the court considered to be "near murder";

d. In *Louati*, who was sentenced to 11 years custody, a consensual fistfight was taking place when Mr Louati without warning stabbed the victim 8 times, 3 of which were lethal wounds-the court concluded the range of sentence for such

> offences was 8 to 12 years "notably because of the brutality of the attack and use of a weapon against an unarmed victim".

[107] Sentences of 11 and 12 years arise in cases of "near murder". I do not have evidence before me that places the events leading to the death of Mr. Clothier in that category. Sentences around the seven years mark arise in cases where offenders stab victims and have limited criminal records, or not for serious violent offences.

[108] The appropriate sentence in this case lies between 7 years and 11 years.

[109] The Pre-Sentence Report suggests, and Mr. Gillis's counsel agrees, that the court should consider including recommendations regarding programming for Mr. Gillis while in custody:

> a. Attend for, and participate meaningfully in, substance abuse assessment and counselling; and
>
> b. Attend for, and participate meaningfully in, mental health assessment and counselling.

[110] I will endorse the warrant of committal as requested.

[111] I will order and sign, the mandatory DNA order pursuant to Section 487.051, and a lifetime ban on firearms, ammunition, and explosives, etc., pursuant to Section 109(3) Criminal Code. Pursuant to Section 737, I impose the mandatory Victim Fine Surcharge of $200, which I direct should be fully paid by December 31, 2025.

[112] In all the circumstances here, denunciation and deterrence of Mr. Gillis's behaviour are the paramount considerations in sentencing him. However, the court must act with restraint, and impose only a sentence severe enough to achieve the objectives of sentencings, including not losing sight of Mr. Gillis's rehabilitation, since eventually he will be released from prison.

[113] After a very careful examination of the facts and applicable law, I am satisfied that a fit and proper sentence of custody for this offence of manslaughter is 9 years (i.e. 3287 days) in a federal penitentiary.

[114] Regarding a pre-sentence custody credit, I rely on the reasoning in *R. v. Carvery*, 2014 SCC 27.

[115] After an assessment of the qualitative and quantitative matters that may give rise to an enhanced credit, the onus being on the offender, I conclude that Mr. Gillis's loss of access to parole and early release while on pre-trial remand, and the lack of programming available during that period that would be available to persons serving sentences, do constitute a "circumstance" capable of justifying enhanced credit. Of the "offender incidents reports" presented regarding Mr. Gillis's time in custody since his arrest March 2, 2016 I find I cannot attach much weight to them, even if I accept them on their face and at their highest level. Therefore, Mr. Gillis has met the onus and will receive 1.5 days credit for every day served since March 2, 2016.

[116] Those 699 days are therefore the equivalent of having served 1048 days or 2 years and 318 days, leaving remaining 6 years and 49 days (2239 days) custody to be served by Mr. Gillis.

Rosinski, J.

APPENDIX "A"

AGREED STATEMENT OF FACTS – R. V. BENJAMIN GILLIS

In March of 2016 Ashley King resided in Unit 4, Number 3 Autumn Drive, Halifax, NS. Ms. King was acquaintances with Mr. Ben Gillis (Defendant), Mr. Blaine Clothier (Victim) and Ms. S (Eye witness). These three individuals were at the residence of Ms. King overnight from March 1, 2016 until the morning of March 2, 2016. Ms. King was not present.

Mr. Gillis, Ms. Clothier and Ms. S all knew one another. They all had substance abuse issues. On March 1st and March 2nd, 2016, all three individuals were consuming illicit substances. At approximately 11:00 am on March 2, there was an argument in Unit 4 between Mr. Gillis and Mr. Clothier. Ms. S was in the room and described that Mr. Gillis was shoving Mr. Clothier while holding a kitchen knife. Mr. Clothier tried to disarm Mr. Gillis. Mr. Gillis stabbed Mr. Clothier. Mr. Clothier fell against a weight bench in the apartment and then onto the floor. Ms. S went to the bathroom, crying. Mr. Gillis left the apartment, leaving the knife behind.

Ms. S exited the bathroom approximately 10-15 minutes later and tried to speak to Mr. Clothier. He did not respond. Ms. S went back into the bathroom for another 20 minutes. She then exited the bathroom and checked on Mr. Clothier. He did not respond. She checked for a pulse and did not find one. Ms. S then left the apartment.

A man from the area was walking his dog, and saw Ms. S in an hysterical state. He spoke to her and then called 911. In the meantime, Ms. S contacted a friend, who came and met her. They then called her father, who picked them up at a nearby Tim Horton's. Ms. S's father drove her to the HRPS headquarters where she provided a statement.

EHS and police attended to Mr. Clothier who was declared deceased. Mr. Clothier had four superficial wounds to his upper body. He had one fatal wound in his lower, front torso. It was 2.8 cms in length. It perforated his kidney, liver and major blood vessels. He bled internally and passed away.

HRP retrieved the knife used by Mr. Gillis from the bathroom of Unit 4. It was tested and found to have the victim's DNA on the blade.

After leaving the apartment Mr. Gillis obtained his methadone from the Direction 180 bus at Guardian Drugs on Herring Cove Road. He then took the bus to his residence. Mr. Gillis was arrested at his residence on Inglis Street between 1:30 pm and 2:00 pm on March 2, 2016.