IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Burgess 2016 NSPC 1

Date: January 6, 2016
Docket: 2412884
Registry: Halifax

Between:

Her Majesty the Queen

v.

Vanessa Burgess

SENTENCING DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	December 10, 2015
Decision:	January 6, 2016
Charges:	section 236(b) of the *Criminal Code*.
Counsel:	Susan MacKay, for the Crown
	Joel Pink, Q.C. and Nasha Nijhawan, for Vanessa Burgess

By the Court:

Introduction

[1] In criminal cases involving a death almost always there are family members and friends who bear witness to the legal proceedings while enduring their unique experiences of loss and grief. When the victim and the perpetrator are related there are additional dimensions to the grief and in this case, the pain of ruptured family bonds and relationships. As two of the victim impact statements have said, the family that included David Burgess and Vanessa Burgess is now "broken."

[2] The sentence I am imposing on Ms. Burgess cannot restore these relationships, return David Burgess to those who loved him, or reflect what Mr. Burgess meant to his family. Sentencing Ms. Burgess is "governed by fixed principles" of law applied to the facts and circumstances of the case. The sentence imposed does not represent "the intrinsic value or worth of the deceased." (*R. v. Costa, [1996] O.J. No. 299, paragraph 42*) Its fundamental purpose is to "contribute…to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions…" (*section 718, Criminal Code*)

[3] On July 31, 2015 after a trial totaling eleven days I convicted Vanessa Burgess of manslaughter in the death of her father, David Burgess. I found the trial evidence established that on the evening of July 20, 2011 in a momentary surge of anger and frustration Ms. Burgess committed the objectively dangerous act of shoving her father hard enough that he fell down steep basement stairs at his home. The propelled fall left Mr. Burgess with catastrophic head injuries. (*R. v. Burgess, 2015 NSPC 47, paragraph 316*) He died in hospital on July 26, 2011. (*R. v. Burgess, paragraphs 1, 243*)

[4] In determining Ms. Burgess' sentence I have been confronted by the very difficult task of balancing the principles and factors I am required to take into account. This case brings into sharp focus the delicate and nuanced exercise that must be undertaken in crafting a proportionate sentence, the formulation of which is "a profoundly subjective process." (*R. v. Shropshire, [1995] S.C.J. No. 52, paragraph 46)*

The Position of the Crown and Defence

[5] The Crown has recommended a sentence of eight years for Ms. Burgess. It is Ms. MacKay's submission that there are significant aggravating factors in this case that call for a substantial penitentiary term.

[6] Ms. Burgess accepts that a penitentiary sentence is required in her case. She understands that a non-custodial sentence is not an option. It is only manslaughter cases with exceptional circumstances that have received non-custodial sentences and changes to the *Criminal Code* have made conditional sentences unavailable. It is Mr. Pink's submission on Ms. Burgess' behalf that a three year prison term is the appropriate sentence. He takes issue with what the Crown has identified as aggravating factors.

The Victim Impact Statements

[7] Mr. Burgess' death and the circumstances under which it occurred have had a devastating effect on the individual members of his family and their relationships. Six family members provided victim impact statements in which they movingly expressed their profound grief and heartache. Mr. Burgess' wife, Lynda, referring to him as her "soulmate", spoke of how much she misses him. His three sisters described their brother as loving and caring. They grieve their loss and the broken family relationships. Mr. Burgess' youngest sister, Christine, has experienced a deterioration in her health since he died. She characterized the description of her brother as "a good guy", offered by many people who have spoken to her since her brother's death, as a perfect description. In her words, "not perfect, but a good guy." Mr. Burgess' sister-in-law, the sister of Lynda Burgess, mourns someone she loved and, as with everyone else who provided statements, laments the deeply painful divisions that now exist in the family. Family members also spoke about the grief experienced by Mr. Burgess' now 95 year old mother who struggles to understand the circumstances of her son's death. She too provided a victim impact statement.

[8] Mr. Burgess' alcoholism is mentioned in some of the victim impact statements as is the love he had for his family, including his love for Ms. Burgess.

Vanessa's Burgess' Background and Circumstances

[9] Interviewed for her pre-sentence report, Ms. Burgess described an unhappy and stressful childhood and adolescence. She was bullied at school and verbally abused at home. She felt emotionally deprived by her parents whom she said were not affectionate with her or with each other. Ms. Burgess had a better relationship with her father than with her mother. She left home at 15 and developed a substance abuse problem. She used illegal drugs and became an alcoholic. Around the age of twenty she overcame her substance abuse dependency and has been sober for over eight years. The evidence at trial indicated Ms. Burgess' belief that her father was resentful of her successful recovery. Although he had been sober for many years while Ms. Burgess was growing up, about eleven years before his death he began drinking again which led to a pronounced deterioration in their relationship.

[10] Ms. Burgess moved back to live with her parents about 15 to 16 months prior to July 2011 so that she could focus on obtaining her high school diploma. She told police that the atmosphere at home prior to July 20 had been "very, very toxic." In her police interrogation and her testimony at trial Ms. Burgess said her father had subjected her to name-calling and disparaging comments. She told the police investigators that her father would try to get a reaction out of her by belittling her in various ways. (*R. v. Burgess, paragraph 51*)

[11] Prior to returning to live with her parents as a 28 year old, Ms. Burgess had been in several relationships during her 20's which, she told the author of the pre-sentence report, had turned violent. She had become a mother at 20. Her son lives with his father and Ms. Burgess sees him regularly on access visits. Several victim impact statements referred to the importance of Ms. Burgess' son to the extended family. Lynda Burgess spoke in her statement about the close bond between Ms. Burgess and her son. Ms. Burgess' Elizabeth Fry Society support worker also remarked on Ms. Burgess' deep love for her son.

[12] Ms. Burgess is now 32. She is involved in a dating relationship with a 39 year old man who is very supportive of her. He is aware that Ms. Burgess has been convicted of manslaughter. He provided a letter of support for her sentencing. Ms. Burgess told the author of the pre-sentence report that her boyfriend is "a strong person with strong family values which is good for her…" She believes the relationship will continue. (*pre-sentence report, page 4*)

[13] Ms. Burgess advised the author of the pre-sentence report that she obtained her Grade 12 with very good marks and attended the Maritime Business College in 2013 for a Business Development Certification. She has worked in various jobs, including most recently as a house painter, but is currently unemployed. The foreman with the painting company where Ms. Burgess had been employed told the author of the pre-sentence report that Ms. Burgess was a reliable and responsible worker who got along well with the other employees and established positive relationships with clients.

[14] Ms. Burgess has been an active and enthusiastic volunteer with Search and Rescue and her church. She was an energetic contributor to the activities of the Student Association at the Nova Scotia Community College where she took her Grade 12. As I will mention shortly, Ms. Burgess is highly valued by her friends, a number of whom have submitted supportive letters on her behalf.

[15] Ms. Burgess has accessed various counselling programs and services in the past including substance abuse counselling and anger management. She has been attending sessions with an Elizabeth Fry support worker since 2013 and her family doctor has prescribed medication to help with sleep disturbance issues and mild depressive symptoms. Her doctor told the author of the pre-sentence report that Ms. Burgess "has a great deal of anger and frustration." (*pre-sentence report, page 6*) Ms. Burgess also reports significant grief over her father's death, telling the author of the pre-sentence report: "I miss him so much. I have had no closure…" (*pre-sentence report, page 8*)

[16] Ms. Burgess' Elizabeth Fry Society Support worker described her as a "very spiritual person" whose spirituality has been helping her cope with the stress of the court proceedings. She indicated that Ms. Burgess "has a positive outlook" toward having a productive future and "is not blaming anyone for this scenario." (*pre-sentence report, page 7*) She suggested that Ms. Burgess can benefit from further counselling.

[17] In the pre-sentence report Ms. Burgess indicated an awareness that she needs to continue in her efforts to identify and address her issues. She told the author of the report: "I have to deal with my anger. I am a good person. Something bad has happened to me and I am willing to take responsibility for it." The pre-sentence

report concludes by stating that Ms. Burgess' "level of commitment to maintaining abstinence from drugs and alcohol is commendable, however that level of commitment to addressing her grief and mental health would benefit [her] as well." (*pre-sentence report, page 8*)

Character References from Ms. Burgess' Friends

[18] I was provided with five letters from friends of Ms. Burgess in support of her good character and pro-social orientation. She is described in these letters as having "a huge heart" and a positive, generous nature. Despite the challenges she has faced as a result of her manslaughter conviction, such as being let go from jobs, she is said to have continued "to try and make things better for her own life and that of those around her." Her friends note Ms. Burgess' devotion to her son and her commitment to being involved in his life. She is described as someone who "always looks at problems as an opportunity to improve things." She is said to consistently show a "genuine kindness" and to maintain a positive outlook. Her boyfriend comments on Ms. Burgess' "wonderful relationship" with her son and her "sweet, caring and loving" disposition. One friend views Ms. Burgess as "the sister I had always needed" and calls her "my rock." It is apparent that Ms. Burgess' friends have found it rewarding to have invested in a relationship with her.

[19] Ms. Burgess' friends also describe her as having loved her father and being remorseful and grief-stricken about what happened.

[20] The Crown took no issue with the character reference letters. The letters confirm that there are always more dimensions to a person than is apparent through the evidence at trial. I accept that Ms. Burgess' friends have offered sincere expressions of their love and respect for the friend they know. I do not question their experience of Ms. Burgess' positive qualities.

[21] However, I do want to comment on the characterization in two of the reference letters of the events of July 20, 2011 as "an accident." Mr. Burgess did not die because there was an accident. Mr. Burgess died because Vanessa Burgess pushed him in anger. That unlawful assault which propelled him down a steep set of stairs led to his death. Ms. Burgess did not intend for her father to be hurt or die. That is why Ms. Burgess was not charged with and prosecuted for murder. What

Ms. Burgess is guilty of is a culpable homicide that was not murder. It will not assist her to come to terms with what her anger caused if those who love and support her insist on treating what happened to Mr. Burgess as an accident.

[22] I dealt with the same issue in *R. v. Isenor*, [2007] N.S.J. No. 487, a one-punch manslaughter case where similarly there were references in support letters to the victim's death having been "an accident". The terminology of "accident" suggests there is no culpability. In *Isenor* I said it must be understood, not only by the offender, but also by the broader community, that where an unlawful assault leads to a person dying, it is a culpable homicide. The fact that the person committing the assault did not intend to kill the victim is what makes it manslaughter and not murder. (*paragraph 36*)

The Purpose and Principles of Sentencing

[23] The sentencing of Ms. Burgess is governed by the sentencing provisions of the *Criminal Code*. Section 718 of the *Criminal Code* sets out the objectives a sentence must achieve: denunciation, deterrence – both specific and general, separation from society where necessary, rehabilitation of the offender, reparations by the offender, and the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[24] Section 718.2 recites the other sentencing principles that the sentencing court is mandated to take into consideration, which for the purposes of this case are, the aggravating and mitigating circumstances, and parity – that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[25] Sentencing is profoundly individualized. (*R. v. Ipeelee,[2012] S.C.J. No. 13, paragraph 38*; *R. v. Wust*, *[2000] S.C.J. No. 19 paragraph 21*; *R. v. M. (C.A.)*, *[1996] S.C.J. No. 28, paragraph 92; R. v. Shropshire, [1995] S.C.J. No. 52*) In determining a fit sentence, "…the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(*a*) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal circumstances." (*R. v. Pham, [2013] S.C.J. No. 100, paragraph 8*; *R. v. Nasogaluak, [2010] S.C.J. No. 6, paragraph 44*) Sentencing judges "must have

sufficient maneuverability to tailor sentences to the circumstances of the particular offence and the particular offender." (*R. v. Ipeelee, paragraph 38*)

[26] Assessing moral culpability is a critical aspect of determining any sentence: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code*) Proportionality is "closely tied to the objective of denunciation", promotes justice for victims, and seeks to ensure public confidence in the justice system. The principle of proportionality,

> …ensures that a sentence does not exceed what is appropriate, given the blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. (*R. v. Ipeelee, paragraph 37*)

[27] In the Supreme Court of Canada's most recent decision on sentencing - helpfully supplied by Ms. MacKay - the Court has held that, "Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*." (*R. v. Lacasse, 2015 SCC 64, paragraph 53*) The Court goes on to note: "…The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a pure mathematical calculation. It involves a variety of factors that are difficult to define with precision."(*paragraph 58*)

Sentencing for Manslaughter

[28] A manslaughter sentence must be tailored to the offender's degree of moral fault for the harm that has been done. Manslaughter "can occur in a wide variety of circumstances" making it necessary that the penalties for it be flexible. (*R. v. Creighton, [1993] S.C.J. No. 91, paragraph 86*)

[29] This is a case of unlawful act manslaughter. The push Ms. Burgess gave her father was an assault which is, of course, an unlawful act.

[30] Mr. Burgess' death was the unintended consequence of Ms. Burgess' unlawful assault. Ms. Burgess is at fault for Mr. Burgess' death and although she did not intend to kill her father when she pushed him, she is required to take responsibility for all the consequences of her actions. (*R. v. Creighton, paragraph 95*)

[31] In *R. v. Henry*, 2002 NSCA 33 the Nova Scotia Court of Appeal identified the role of moral blameworthiness in the broad sentencing range for manslaughter cases. Roscoe, J.A. indicated that,

> …The court, while of course giving due weight to all the principles of sentencing must assess the extent of moral blameworthiness in a particular case, and should consider where on the spectrum, from almost accident to almost murder, the particular offence falls. Obviously, the nearly equivalent to murder offences will, in general, attract a sentence higher than the majority…and those closer to an accidental killing will generally fall below the average. (*paragraph 19*)

[32] In the moral blameworthiness assessment in unlawful act manslaughter cases it is what the unlawful act involved that is relevant. A range of considerations must be assessed: the nature of the unlawful act; the degree of force used by the offender in perpetrating the act; the degree of violence or brutality; whether a weapon was used; the extent of the victim's injuries; whether there was gratuitous violence; the degree of deliberation involved in the act; the extent to which forethought or planning was involved; the complexity of the act; what, if anything, provoked the act; the time involved in perpetrating the act; and the element of chance involved in the resulting death. (*R. v. Tower, [2006] N.S.J. No. 293 (S.C.), paragraph 30*)

[33] Manslaughter can occur in diverse circumstances. Mr. Pink submits that the circumstances of Ms. Burgess' offence are most like the one-punch manslaughter cases that have happened in our community, for example, *R. v. Henry, [2002] N.S.J. No. 113 (S.C.)*, *R. v. Isenor, [2007] N.S.J. No. 487 (P.C.)*, *R. v. Hickey, [2011], N.S.J. No. 244 (S.C.)*, and *R. v. Whitehead, [2014] N.S.J. No. 667 (S.C.)*. I will discuss these cases next including why the Crown views them as dissimilar. I will then review some of the cases provided by Ms. MacKay.

The One-Punch Manslaughter Cases

[34] Mr. Henry, like Ms. Burgess, went to trial on a charge of manslaughter and was convicted. The trial judge found that on leaving a downtown bar at closing time, Mr. Henry noticed a man – Mr. Johnstone – strike a young woman twice after she had pushed or shoved him. Mr. Henry intervened immediately by pinning Mr. Johnstone against a wall, berating him for hitting a woman. He let Mr. Johnstone go but decided to follow him along the street. He caught up to him and tapped him on the shoulder. When Mr. Johnstone turned around Mr. Henry "sucker-punched" him which caused Mr. Johnstone to fall backwards and hit his head on the pavement. The impact knocked Mr. Johnstone unconscious and the head injury he sustained was fatal. Mr. Henry abruptly left the scene as bystanders began to gather. Very shortly afterwards he noticed the police had arrived where Mr. Johnstone was lying.

[35] Mr. Henry had been overheard to say to Mr. Johnstone just before punching him, "this is what you get for hitting a girl" "or words to that effect." (*R. v. Henry, paragraph 5*) After leaving the scene, Mr. Henry encountered the young woman and offered her a drive home. He was found to have said in her presence that he "took care of it" referring to the assault by Mr. Johnstone that Mr. Henry had witnessed.

[36] The trial judge rejected Mr. Henry's claim of self-defence and found that his motivation for assaulting Mr. Johnstone was a form of vigilante justice. (*R. v. Henry, paragraphs 6 and 8*) The Court of Appeal agreed with the Crown's description of the aggravating factors: that Mr. Henry engaged in "a cowardly attack" on the victim; that he acted as "a vigilante, a predator"; that "His objective was to strike an unanswered blow"; that he acted out of anger "that he chose not to control"; that "at least part of his motivation was a desire to impress" the young woman whom Mr. Johnstone had assaulted. It was noted that Mr. Henry did not render any assistance to Mr. Johnstone and instead immediately sought out the woman, telling her that he "took care" of the man who had assaulted her. (*R. v. Henry, paragraph 23, citing the Crown's appeal factum*)

[37] Mr. Henry had no criminal record and although in his interview for the pre-sentence report he expressed remorse for Mr. Johnstone, he was not viewed as remorseful for "his reaction to the events" of the fateful evening.

[38] A successful Crown appeal saw Mr. Henry receive a four year penitentiary sentence instead of the conditional sentence of two years less a day imposed by the trial judge. The Court of Appeal found the trial judge "overemphasized restorative objectives and gave little regard to the principles of denunciation and general deterrence." The original sentence was described as "clearly inadequate and excessively lenient." (*paragraph 12*) The Court subsequently referenced an earlier decision, *R. v. Myette*, where it was held that, "Lenient sentences have been imposed only where very strong mitigating factors exist or where the act, though culpable, was close to being an accident." (*R. v. Henry, paragraph 19, citing R. v. Myette, [1985] N.S.J. No. 472, paragraph 47.*) In *Myette*, the Nova Scotia Appeal Division noted that sentences in the "great majority" of manslaughter cases range from four to ten years.

[39] In increasing Mr. Henry's sentence, the Nova Scotia Court of Appeal referred to the aggravating circumstances of the case – Mr. Henry's "continued notion that his action was justified, and the predatory callousness of his intentional assault on a smaller, intoxicated man…" The Court held that Mr. Henry's moral blameworthiness was "well beyond the near accident point" on the manslaughter sentencing "spectrum" and required a sentence that emphasized denunciation and deterrence. (*paragraph 29*)

[40] In *Isenor*, I distinguished the *Henry* case and imposed a shorter sentence of imprisonment, a penitentiary term of three years. *Isenor* was another case where the unlawful act was a single punch. There was no gratuitous violence and no weapon was used. Mr. Isenor decided to "stand up to" the victim's drunken behaviour by punching him. He had concluded that Mr. Moore, who had been verbally abusive, "had earned himself a punch in the mouth." (*R. v. Isenor, paragraph 8*) I found that the period of Mr. Isenor's deliberation before punching Mr. Moore lasted no more "than a matter of seconds." Mr. Isenor was not expecting that the much taller and heavier man would be knocked down. He thought Mr. Moore would come looking for him to settle the score. (*Isenor, paragraph 26*)

[41] The *Hickey* case, like *Henry* and *Isenor*, also involved a trial and an unsuccessful claim of self-defence. Mr. Hickey punched the victim once in anger. It was a deadly punch. In his sentencing decision, Cacchione, J. noted that Mr. Hickey delivered a punch "with such significant force that it shattered many of Mr. Carter's facial bones and caused his brain to rotate in his skull." (*R. v. Hickey, paragraph 19*) Mr. Hickey's anger toward Mr. Carter had been simmering because of comments Mr. Carter had made and "his temper reached the boiling point when he perceived Mr. Carter as calling him a liar." (*paragraph 58*) Cacchione, J. found the aggravating factors to be: Mr. Hickey's involvement in a dispute between Mr. Carter and Mr. Hickey's employer that was none of his business; Mr. Hickey's use of violence in response to a verbal dispute; his knowledge that Mr. Carter was under the influence of alcohol; the degree of force used; and Mr. Hickey's continued belief that what he did was justified. (*R. v. Hickey, paragraph 46*)

[42] Cacchione, J. concluded that Mr. Hickey's case "straddled" the *Isenor* and *Henry* cases and imposed a three-and-a-half year penitentiary sentence. He emphasized denunciation and general deterrence and held: "It must be understood by the community at large that violence will not be tolerated and that a simple assault can have tragic consequences and serious repercussions." (*R. v. Hickey, paragraph 64*)

[43] Unlike Mr. Henry, Mr. Isenor, and Mr. Hickey, Jason Whitehead pleaded guilty to committing a one-punch manslaughter. There had been an incident at a downtown bar between the victim's drunk and aggressive brother and Mr. Whitehead. Outside the bar, Mr. Whitehead walked quickly in the direction of the victim, James Mattatall, and his brother. Mr. Mattatall raised his arms to diffuse the situation. Arnold, J. found that Mr. Whitehead, "fueled by alcohol", punched Mr. Mattatall once in the face breaking his orbital bones and knocking him to the ground "with such force that he suffered significant trauma to his brain and died." (*R. v. Whitehead, paragraph 42*)

[44] Arnold, J. found it to be aggravating that Mr. Whitehead had a significant weight and strength advantage over the victim possibly outweighing him by as much as 100 pounds. (*R. v. Whitehead, paragraph 42*)

[45] The Crown in the *Whitehead* case sought a four year prison sentence. The Defence submitted that two years was appropriate. Taking into account the mitigating factors of Mr. Whitehead's guilty plea, his acknowledgement of responsibility and expression of remorse, Arnold, J. imposed a three year penitentiary term.

[46] Ms. MacKay does not see any similarity between the one-punch manslaughter cases and Ms. Burgess' unlawful assault of her father. In her submission the following factors differentiate these cases: Ms. Burgess' unlawful pushing of her father at the top of steep stairs was more objectively dangerous than a single punch in the street where harm but not death was foreseeable; Ms. Burgess' assault of her father occurred in a private home in contrast to the one-punch cases which happened in public areas where the presence of people meant help would be available; and Ms. Burgess was completely sober whereas Mr. Isenor, Mr. Hickey and Mr. Whitehead had all been drinking. (I note that Mr. Henry was described as "not under the influence of alcohol." (*R. v. Henry, paragraph 3*)) In the course of the discussion that follows I address Ms. MacKay's points.

Unlawful Acts that are Objectively Dangerous and the Foreseeability of Life-Threatening Injuries or Death

[47] Ms. MacKay provided me with a number of cases that she relies on to support the Crown's position that Ms. Burgess should be sentenced to eight years in prison. *R. v. Cottreau*, [2011] O.J. No. 6245 (C.J.) involved the offender giving the victim "a tackle/shove" which the court found had "unpredictable consequences" in that "death was not foreseeable." (*R. v. Cottreau, paragraph 10*) Ms. MacKay submits that this "is in stark contrast" to Mr. Burgess being pushed at the top of a steep set of stairs. Mr. Cottreau was sentenced to four years.

[48] Several of the other cases provided by Ms. MacKay involved stabbings that resulted in death. In *R. v. Kanate*, [2011] O.J. No. 5953 (C.J.), Mr. Kanate was originally charged with second degree murder and pleaded guilty to manslaughter during the course of the preliminary inquiry. (*R. v. Kanate, paragraph 1*) There had been drinking and arguing between Mr. Kanate and the victim which culminated in the victim producing a knife. Mr. Kanate took the knife and stabbed the victim in his left arm above the elbow, severing an artery and causing the

victim to bleed to death. In *R. v. Reid*, [2012] O.J. No. 6313 (S.C.J.), Mr. Reid stabbed his sister's boyfriend in the abdomen after they had been fighting. Mr. Reid pled guilty to manslaughter following his preliminary inquiry on a charge of second degree murder. In *R. v. Sinclair*, [2011] A.J. No. 1161, Ms. Sinclair stabbed a close friend in the chest after becoming very angry over her suspicion that the friend had been unfaithful to her fiancé who was Ms. Sinclair's brother. The Alberta Court of Queen's Bench observed that stabbing someone in the chest, "objectively assessed…obviously subjects the victim to risk of life-threatening injury." (*R. v. Sinclair, paragraph 14*) The court found that the stabbing was spontaneous and impulsive and inferred that Ms. Sinclair "did not subjectively intend to cause [the victim] life-threatening injury." (*R. v. Sinclair, paragraph 16*)

[49] I understand Ms. MacKay to be saying that Ms. Burgess pushing her father at the top of the steep basement stairs was as objectively dangerous as the stabbings in *Reid* and *Sinclair* even though no actual weapon was used. As I have already noted, it is Ms. MacKay's submission that the one-punch manslaughter cases occur in circumstances that are less objectively dangerous.

Assessing a Range of Considerations in Determining Moral Blameworthiness

[50] In my trial decision I found that on the evening of July 20, 2011, Mr. Burgess was verbally abusive to Ms. Burgess and likely intoxicated when he returned home from visiting family nearby. (*R. v. Burgess, paragraphs 70 and 75*) Although Ms. Burgess had enjoyed a positive relationship with her father when she was growing up, once he started drinking again their relationship deteriorated. (*R. v. Burgess, paragraphs 49 – 50*) Jonathan Burgess' evidence that Mr. Burgess was capable of name-calling when he was drinking was confirmatory of Ms. Burgess' claim that she experienced this behaviour while living at home with her parents in 2011.

[51] I said the following in my decision:

> The atmosphere in the Burgess home on July 20, 2011 was tense. Mr. Burgess was drinking which seems to have had the effect of fueling a hostile attitude toward Vanessa. Vanessa has been consistent in describing her father's treatment of her on

> July 20 as nasty. She testified to this effect and spoke about it to her brother, in various text messages and in her statements to the police. (*R. v. Burgess, paragraph 117*)

[52] I found the evidence at trial established that Ms. Burgess pushed her father at the top of the basement stairs in "a momentary surge of anger and frustration" because of his "drunken, obnoxious verbal abuse." She "snapped" and lashed out at him. Referring to one of the texts Ms. Burgess sent on July 21 I found that she had "had enough of his mouth" and pushed him. (*R. v. Burgess, paragraph 317*) The force she used propelled him to the bottom of the basement stairs where he hit his head and sustained fatal injuries. (*R. v. Burgess, paragraphs 315 and 316*)

[53] I also found that Ms. Burgess did not tell her mother the truth of what had happened until the next morning after they had both left the house. Ms. Burgess told Lynda Burgess on the night of July 20 that Mr. Burgess had "fallen drunk" which I inferred was the reason Mrs. Burgess left her husband at the bottom of the stairs. Ms. Burgess did nothing to ensure that her father was checked out for injuries even though her brother had urged her to call an ambulance. (*R. v. Burgess, paragraphs 258 and 303*)

[54] The evidence at trial led me to conclude that Ms. Burgess did not know her father had been severely injured until later on July 21. By then she had told her mother the truth. Before she knew that Mr. Burgess was in intensive care, Ms. Burgess had texted friends saying she had "thrown" him down the stairs. (*R. v. Burgess, paragraph 308*) I found that this language "indicates the extent of the force she used" on her father. (*R. v. Burgess, paragraph 306*)

[55] As I said in my trial decision, it was after Ms. Burgess learned her father was in intensive care with grave injuries that she "revised her narrative." (*R. v. Burgess, paragraph 308*)

Aggravating Factors

[56] My trial findings identify a number of aggravating factors:

- Ms. Burgess used considerable force against her father in objectively dangerous circumstances at the top of a steep set of stairs;

- Ms. Burgess was larger, stronger and sober. Her father was of slight stature and intoxicated;
- Ms. Burgess did not do anything to have Mr. Burgess assessed for injuries he might have sustained in such a serious fall, a fall from the top to the bottom of the stairs. She did not tell her mother the truth about how Mr. Burgess had fallen until the next morning after they had both left the house and Mr. Burgess was still at the bottom of the stairs.

[57] On this last point - that Ms. Burgess withheld the truth from her mother until the morning of July 21 - while it is a fact that Lynda Burgess did not call 911 even once she learned from her daughter what had actually happened, Ms. Burgess could not have known what her mother might have done if she had been told the truth the night before. The aggravating nature of Ms. Burgess withholding the truth from her mother on the night of July 20 is not diminished by the fact that Lynda Burgess did not call 911 the next morning after her daughter told her what had really happened.

[58] The fact that Lynda Burgess ultimately did not obtain help for Mr. Burgess until the late afternoon of July 21 when she returned home from work does not alleviate the responsibility that rested on Ms. Burgess to ensure her father was not injured. Ms. Burgess could have done what her brother urged and called an ambulance right away. The evidence at trial indicated that medical intervention probably would have not have changed the outcome but it would have resulted in Mr. Burgess receiving appropriate care much sooner.

What are Not Aggravating Factors

[59] The aggravating factors I have identified are amongst the aggravating factors which the Crown has submitted I should take into account. Ms. MacKay describes some additional factors which I do not view as aggravating.

[60] Ms. MacKay submits it is also aggravating that Ms. Burgess "was the adult child of the victim, whom the victim had permitted to come back to live in his residence in order to assist her" and adds that "The victim was in his own home, and was entitled to be free from any violence, especially from a member of his own family." (*Written submissions by the Crown dated December 9, 2015*)

[61] There is no evidence that Ms. Burgess returned to live with her parents harbouring any intention of creating conflict. She accepted their invitation to move back home so that she could get her Grade 12. Although I found the atmosphere was "fraught" and there were "lots of arguments" (*R. v. Burgess, paragraph 48*), by July 20, 2011 Ms. Burgess had lived with her parents uneventfully for 15 or 16 months. She achieved what she and her parents had hoped for and graduated with her high school diploma. She was planning to move out before the end of the summer.

[62] The tragedy of Mr. Burgess' death happened because of the dynamics in the family home and, ultimately, Ms. Burgess' inability to control her anger and frustration. I do not find there is any basis for a determination that a manslaughter occurring in a family context is automatically aggravating. I do not find that it would be appropriate to refer to what Ms. Burgess did to her father as a "betrayal" which is language used in *R. v. Reid*, one of the cases supplied by the Crown. Raymond Reid and his victim, Jesse Low, knew each other well. Mr. Low lived with Mr. Reid's sister. (*R. v. Reid, paragraph 1*) At one point when they were fighting before the stabbing, Mr. Reid told Mr. Low: "I love you, we're family." (*R. v. Reid, paragraph 9*) The sentencing court, listing the aggravating factors, included the fact that Mr. Low and Mr. Reid were friends and stated: "Mr. Reid betrayed that friendship when he stabbed Mr. Low." (*R. v. Reid, paragraph 49*)

[63] I have found that Ms. Burgess pushed her father at the top of the stairs in a spontaneous eruption of anger and frustration. In doing so she committed an unlawful assault that led to his death. The circumstances in *Reid* were quite different. The fighting between Mr. Reid and Mr. Low that led to Mr. Reid fatally stabbing Mr. Low was apparently over "someone getting lippy." (*R. v. Reid, paragraph 8*) The young men were heavily intoxicated and an evenly-matched fight was taken to an entirely different level by Raymond Reid plunging a knife into his friend's abdomen.

[64] A very unhealthy dynamic existed between Ms. Burgess and her father in July 2011. It tragically played itself out in the family home where Ms. Burgess was living temporarily. The significance, as an aggravating factor, of the location of the culpable homicide committed by Ms. Burgess is that there was no one present to assist Mr. Burgess. I have already identified as an aggravating factor that Ms.

Burgess did not call an ambulance. I find that to be what is significant about the offence being committed in Mr. Burgess' home. He was more vulnerable there because there was no opportunity for someone to come to his aid unless Ms. Burgess or her mother called 911. Had an ambulance been called the fact of the assault occurring in a private home rather than the street would not have mattered.

[65] I will now review the range of considerations that must be assessed in determining Ms. Burgess' moral culpability and in doing so address facts that Ms. MacKay has asserted are aggravating.

[66] The circumstances to be considered in assessing Ms. Burgess' moral culpability are: the nature of the unlawful act – a forceful shove or push; the degree of force used by Ms. Burgess – significant, as it propelled Mr. Burgess from the top to the bottom of the stairs; the degree of violence or brutality – it was a single, forceful shove or push; the extent of the victim's injuries – fatal head injuries consistent with the fall; whether there was gratuitous violence – there was none; the degree of deliberation involved in the act – it was "a momentary surge of anger and frustration"; the complexity of the act – it was a simple push or shove; and the time involved in perpetrating the act – it all happened very quickly.

[67] A somewhat more detailed examination is required for the following elements: whether a weapon was used; the extent to which forethought or planning was involved; and the element of chance involved in the resulting death.

Whether a Weapon was Used

[68] A weapon was not used by Ms. Burgess but as I mentioned earlier in these reasons, Ms. MacKay has argued that the shove at the top of the stairs was as objectively dangerous as the use of a weapon in an unlawful assault. I do not agree. 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. It remains true that pushing someone at the top of a steep set of stairs is objectively dangerous. A reasonable person would appreciate that the victim in these circumstances could be badly hurt by the ensuing fall.

The Extent to Which Forethought or Planning was Involved

[69] In my trial decision I described a telephone call made by David Burgess to his brother-in-law, David Crocker, on the night of July 20. Mr. Burgess told Mr. Crocker that Ms. Burgess had threatened to kill him, he wondered if he should call 911 and was afraid to go to sleep. I found that Mr. Burgess' statements to Mr. Crocker confirmed that he and Ms. Burgess had been arguing although at the time of the call, the arguing had subsided. Mr. Burgess told Mr. Crocker that Ms. Burgess was "locked" in her room and would not speak to him. (*R. v. Burgess, paragraph 291*)

[70] Ms. MacKay has submitted that the telephone call is "evidence of [Ms. Burgess'] prior animus toward [Mr. Burgess] that day" which constitutes an aggravating factor. I do not agree. While the evidence from the trial does establish that Ms. Burgess and her father were having conflict on July 20 and that in the evening it became heated enough for Ms. Burgess to threaten him, I stated as follows in my decision: "…I do not find that it was ever Vanessa's intention to hurt or kill her father." (*R. v. Burgess, paragraph 294*)

[71] I did not find that prior animus played a role in what happened at the top of the stairs. Ms. Burgess shoved her father in circumstances where their arguing had resumed and she reacted in "a momentary surge of anger and frustration…" (*R. v. Burgess, paragraph 316*) There was no evidence at trial that indicated any forethought or planning by Ms. Burgess even if earlier she had been angry enough to utter a threat.

The Element of Chance Involved in the Resulting Death

[72] I find there was an element of chance in Mr. Burgess' death. The chance lies in the uncertain effect of a shove at the top of a set of stairs. An unlawful assault of this nature could propel the victim to the bottom of the stairs as it did in this case but how far the person would fall or how severely he would be injured would depend on how fast he was moving. There is nothing in the medical evidence from the trial to establish that shoving someone at the top of a set of steep stairs would always be fatal.

Mitigating Factors

[73] Ms. Burgess' previous good character and lack of a prior record are mitigating factors. She has endeavoured to be a contributing member of the community through her Search and Rescue volunteer work and has been supportive and helpful to her friends. She has shown herself to be a good, reliable employee. She is to be credited for attending counselling sessions through the Elizabeth Fry Society and for maintaining sobriety after a struggle with substance abuse issues.

[74] Ms. Burgess' remorse is also a mitigating factor entitled to some, albeit limited weight. Ms. Burgess is described as remorseful in the pre-sentence report which indicates that she accepts responsibility for her actions and does not rationalize or deny her behaviour. However Ms. Burgess qualified her role by stating: "apparently my push pushed him down the stairs but there was no intent to hurt him. I would never hurt my father. This hurts me a great deal…" As I mentioned earlier in these reasons, she also told the author of the pre-sentence report: "…I am a good person. Something bad happened to me and I am willing to take responsibility for it." (*pre-sentence report, pages 7 and 8*) It seems obvious that Ms. Burgess has not fully recognized the extent of her responsibility for her father's death.

[75] Ms. Burgess does not get the mitigating benefit of a guilty plea, a mitigating factor that has been present in some of the cases I have reviewed. She was entitled to go to trial. Her decision to do so is a neutral factor in the sentencing analysis.

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.

Determining the Appropriate Sentence for Ms. Burgess

[82] Earlier in these reasons I noted the appellate decision in *Myette* found that the sentencing range for most manslaughter cases is between four and ten years. In its recent decision of *Lacasse*, the Supreme Court of Canada had the following to say about sentencing ranges:

> …Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straightjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case…(*R. v. Lacasse, paragraph 57*)

[83] The Court went on to say that sentencing ranges "must in all cases remain only one tool among others that are intended to aid trial judges in their work." (*R. v. Lacasse, paragraph 69*)

[84] In employing the tools available to me for crafting Ms. Burgess' sentence, I find strong parallels between the one-punch manslaughter cases I have referred to and the circumstances of this culpable homicide. And notwithstanding *R. v. Berry*, [2015] O.J. No. 2002 (S.C.J.) which Mr. Pink referred me to for the proposition that a push involves a "somewhat different" intent than a punch (*paragraph 34*), I do not find the push Ms. Burgess gave her father to be readily distinguishable from the punches delivered by Mr. Henry, Mr. Isenor or Mr. Whitehead. Those punches propelled the victims to the ground causing their fatal head injuries. Ms. Burgess' push, delivered in anger, had the same effect.

[85] I find that the circumstances of this manslaughter fall, as do many of the one-punch manslaughter cases, neither near the accident nor near the murder end of the moral culpability spectrum but at some mid-point. There is a need to emphasize denunciation and deterrence where, as here, a spontaneous eruption of anger into violence causes a death. A momentary loss of control has had unintended but devastating consequences.

[86] I find there are features of this case, discussed in these reasons, that justify a longer sentence than was imposed in *Henry*, *Isenor,* and *Whitehead*, the cases I regard as most comparable having regard for the principles of proportionality and parity. For example, notwithstanding the punishment aspect of the punch delivered by Mr. Henry to Mr. Johnstone, a punch that appears to have been intended to deliver a message and involved deliberation and forethought, I find the circumstances in which Ms. Burgess pushed her father to be more aggravating. I am referring to the fact that, in circumstances where there was no one around to intervene and assist Mr. Burgess once he fell, Ms. Burgess did nothing to have her father assessed for injuries.

[87] I do not however regard Ms. Burgess' actions as similar to those of the offender in *Tower*, where a conviction for manslaughter produced a five-year prison sentence. (*R. v. Tower, paragraph 50*) The Crown had argued for 12 years. (*paragraph 24*) Mr. Tower was described at sentencing as having "exhibited predatory callousness in his intentional assault on a smaller intoxicated man." He chose to act as a neighbourhood enforcer and confront the victim who was causing a ruckus. He used garden shears, described as an "improvised weapon" to strike the victim on the back with two blows delivered by a baseball swing. This "excessive and unwarranted response to the situation at hand" caused internal injuries that led to the victim's death. (*paragraph 31*)

[88] I have concluded that the aggravating factors in Ms. Burgess' case drive her moral culpability above what a three year sentence represents in terms of proportionality. A proportionate sentence for Ms. Burgess has to be greater than three years. However I am satisfied that the mitigating factors in this case and the similarities with the one-punch manslaughter cases bring this case well below the eight year sentence being sought by the Crown. I find that an eight year sentence would be a grossly disproportionate sentence in the circumstances. An eight year

penitentiary term does not constitute an appropriate assessment of Ms. Burgess' moral blameworthiness and all the other factors I have been discussing.

[89] Taking into account all the circumstances in this difficult and mercifully uncommon case and the aggravating and mitigating factors, I find that a proportionate sentence for Ms. Burgess is four years in prison. This is a significant sentence by any measure and particularly so for someone who has never been subject to the criminal justice process before. It is a denunciatory and deterrent sentence. It is also a sentence that takes into account the principle of restraint and recognizes the importance of Ms. Burgess' rehabilitation which cannot be exclusively addressed in the federal penitentiary system. A critical feature of Ms. Burgess' rehabilitation will be her relationship with her son. She should return to the community while there is still time for her to discharge, for his benefit and hers, a parenting role during his formative years. A sentence of four years properly balances the necessary emphasis on denunciation and deterrence and the essential objective of Ms. Burgess' rehabilitation. I will refer again to the Supreme Court's recent decision in *Lacasse* where the Court said:

> One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate. (*paragraph 4*)

[90] I will sign the ancillary orders for DNA and a weapons prohibition for life pursuant to section 109.

[91] Ms. Burgess' warrant of committal shall be endorsed with my recommendation to the Correctional Service of Canada that Ms. Burgess receive appropriate mental health counselling for anger and grief and that ongoing access to her son be supported throughout her sentence.