

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Johnson*, 2023 NSSC 375

Date: 20231103

Docket: CRBW 507737

Registry: Bridgewater

Between:

His Majesty the King

v.

Terry Richard Johnson

SENTENCING DECISION

Judge: The Honourable Associate Chief Justice Patrick J. Duncan

Heard: October 4 and November 3, 2023, Bridgewater, Nova Scotia

Oral Decision: November 3, 2023

Written Decision: November 23, 2023

Counsel: Leigh-Ann Bryson and Bryson McDonald, for the Crown
Darren MacLeod, Matthew Dill and Shawnee Gregory for
Mr. Johnson

By the Court (Orally):

NOTE: In reducing to writing the oral decision rendered in this matter, editing has taken place to include omitted citations and quotes from secondary sources and to make changes to format or to grammar for readability. No changes have been made to the substantive reasons for decision.

Introduction

[1] Terry Richard Johnson entered a plea of guilty to the charge that he on or about the 17th day of June 2021, at or near Dublin Shore, Lunenburg County, Nova Scotia did unlawfully cause the death of Kenneth Savory, and in doing so committed manslaughter contrary to s. 236(b) of the *Criminal Code*.

[2] Mr. Johnson is here today to be sentenced for his crime.

Circumstances of the Offence

[3] The circumstances of this offence have been set out in the Agreed Statement of Facts, which was read into the record by the prosecutor and agreed to by Mr. Johnson at an earlier appearance. That document will be appended to this decision and so form part of the reasons for decision. In short, Mr. Johnson, in the dangerous operation of his truck, unintentionally struck and killed Kenneth Savory.

[4] I am satisfied that the agreed upon facts justify the charge that Mr. Johnson has admitted to. Later, I will set out in my analysis how those facts impact on my determination of what is a fit and proper sentence to impose.

Circumstances of the Offender

[5] I have had the benefit of a Pre-Sentence Report, in addition to several letters of support for Mr. Johnson that speak to his character. This information assists the court in better understanding Mr. Johnson's criminal behaviour, that is, what may have contributed to his conduct and his potential for rehabilitation.

[6] Mr. Johnson is 60 years old. He was raised by his mother and stepfather in what he described as a "stable, supportive home environment". He maintains a close

relationship with both, who are aware of this matter. It appears that there were no negative influences on him, at home or among his friends, while growing up.

[7] He left home at age 20, later purchased a mobile home near his parents and eventually married. Mr. Johnson spent 43 years with Nancy Johnson, 30 years of which they were married. They have two adult sons. The couple are separated and I understand that a divorce is pending.

[8] The cause of the marital breakdown was, in Mr. Johnson's assessment, due to an emotional distance that was initially contributed to by his being away fishing for long periods of time. In 2013, when he discontinued that work and began staying at home, relations became strained. He eventually left the home in 2019.

[9] Mr. Johnson maintained that he was a "good provider" for his family and that there were no issues of abuse or addiction or other negative behaviours in his relationships with family members.

[10] Nancy Johnson verified that Mr. Johnson provided well for the family and that the boys had the best of everything, except for their father's attention.

[11] Mr. Johnson entered into a relationship with Angela Bailey shortly after the separation. None of his family approved of Ms. Bailey, which contributed to a further deterioration in his familial relationships.

[12] Mr. Johnson added that his relationships with all family members, including his parents and his sons, have changed for the worse since the death of Mr. Savory.

[13] The Pre-Sentence Report author also interviewed Mr. Johnson's mother, Victoria Rhodenizer. She confirmed Mr. Johnson's account of his home life prior to going out on his own. She also expressed the family's unwillingness to accept Ms. Bailey and the strain that caused on the family.

[14] Mr. Johnson has shown himself to be an industrious and flexible worker, seeking new challenges and taking courses to support his experience. He has education as an automotive mechanic, in a culinary program and in the fishing industry.

[15] In 2007, he began a landscaping company. He obtained a Diploma in Gardening and Landscaping in 2010 and grew his own business that, at the time of

the offence, was employing 8-12 seasonal employees. It is my understanding that company ceased operating under him since he was charged. As such he has no income. He does however have outstanding debts to Revenue Canada of approximately \$100,000.

[16] Following the commission of the offence his driving privileges, I am told, were suspended by provincial authorities for a period of five years.

[17] Mr. Johnson has no disabling medical issues. He indicated that while he has some health issues, it is his desire to return to work in the community upon release.

[18] His health issues include "a bad back", treatment for Lyme Disease that existed prior to his remand into custody and since his incarceration he has received a diagnosis and treatment for Attention Deficit Hyperactivity Disorder. He is also on medication for anxiety. He has some history of alcohol and drug use but there is no indication that treatment is needed for this, neither was it a factor in the commission of this offence.

[19] Mr. Johnson appears to have led a pro-social life until the commission of this offence.

[20] The Pre-Sentence Report author offered her observations of Mr. Johnson, describing him as polite and cooperative, that he expressed remorse and accepted responsibility for his actions. He recognized the pain caused to other persons resulting from his actions.

[21] In relation to this offence, Mr. Johnson identified contributing factors to his conduct as "an anxiety attack" and the effects of withdrawing from medication he had been taking for Lyme Disease.

[22] The Pre-Sentence Report author indicates that a referral to therapy might be suggested as part of a future treatment program for him.

[23] Mr. Johnson has a criminal record. In 1991 he was fined for failing the breathalyzer and in 1999 again fined for refusing the breathalyzer.

[24] Those two alcohol-related driving convictions suggest that there was a time in Mr. Johnson's life where alcohol consumption was an issue. However, the last

time was over 20 years prior to the current offence and, as I have indicated, was not a factor in the commission of this offence.

[25] There is a more recent conviction, however, that is relevant.

[26] In November of 2021 after being remanded into custody, Mr. Johnson pleaded guilty to a charge of failing to comply with a court order to have no contact with certain persons in this case (s.145(5)(b) of the *Criminal Code*). He received a sentence of 45 days in custody which was served while he was on remand in relation to this charge.

[27] This more recent offence, for which he was already punished by incarceration, would indicate to some extent whether Mr. Johnson has the capacity to comply with court orders. However, it cannot be used as a factor to increase his sentence today.

Victim Impact Statements

[28] I have had the benefit of Victim Impact Statements prepared and provided by Angela Bailey (ex-partner of the victim), Frederick Bailey (Angela's father), Susan Greek (sister of the victim), Silas and Chloe Savory (children of Kenneth Savory and Angela Bailey). For those who provided those Statements and who spoke to them, I want you to know that I was moved by your sharing these most private and difficult thoughts about this terrible tragedy. Thank you for being willing to do so.

[29] There is a common theme expressed by all: that they loved Mr. Savory, that he was special to each of them and each in their own way and that there is a hole in their lives that cannot be filled.

[30] The senselessness of his death and the manner of his death is with them constantly and intrudes on their lives in ways that makes their lives more difficult. It impacts on one's mental health.

[31] In sharing their pain, it reminds us that there are victims beyond Mr. Kenneth Savory. It reminds us that the damage will continue long after this court case is done and that there is no sentence of this court that can heal those wounds. I can only hope that you are able to find peace in your memories of him.

[32] I will turn now to the positions that have been advocated by the parties.

Positions of the Parties

[33] The prosecution submits that Mr. Johnson should be incarcerated for a period of 10-12 years, adjusted by credit for pre-sentence custody. In support of this position, the prosecution cites a series of cases that speak to the range of sentences for manslaughter convictions and factors in those cases that they submit support their position. I will outline those factors.

[34] First, they submit that the sentence should be consistent with those cases where death occurred in an act of domestic violence. If the court accepts this submission, then the Crown maintains that, but for exceptional circumstances, the sentencing range begins at 10 years' imprisonment.

[35] Second, that a motor vehicle was used to commit the offence. The range of sentence for manslaughter in which a motor vehicle was involved is, according to the prosecution, 7-18 years' imprisonment. The prosecution, in comparing the moral blameworthiness of Mr. Johnson with those reported cases, argues that a sentence of 12 years is consistent with the relevant caselaw.

[36] Third, that Mr. Johnson failed to alert authorities of what happened and left the scene without offering assistance.

[37] Fourth, that he committed an offence by contacting Angela Bailey, in contravention of a condition on his Warrant of Remand forbidding such contact.

[38] The prosecution acknowledges that the accused's plea of guilty is a mitigating factor although they qualify it by noting that it was only after a preliminary hearing. They agree that his expression of remorse is a mitigating factor and they note the positive Pre-Sentence Report and pro-social lifestyle he has led. However, they do so without comment on how these might be weighed in achieving the purposes of sentencing.

[39] Counsel for Mr. Johnson submits that the offender should be sentenced to a period of 4 years' imprisonment, considered served by time spent on remand. In support of this position, counsel cites a series of cases that speak to the range of sentences for manslaughter convictions and the factors from those cases that support the offender's position. I will outline those factors that counsel have pointed me to.

- That the death of Mr. Savory should be assessed on the lower end of a range of 4-10 years' imprisonment. The offender's submission is that Mr. Savory exited the residence just as Mr. Johnson swerved away from Ms. Bailey. As he did so, he unintentionally struck Mr. Savory, thus "placing it much closer to an accident than murder." If the court accepts this proposition, the defence says that the range of caselaw presented to the court will support the recommendation of four years.
- That Mr. Johnson's mature age and many years as a successful businessman, as well as having been recognized with the Lieutenant Governor's Persons with Disabilities Employer Partnership Award, speaks to his good character in the community.
- That he has had a pro-social life.
- That the positive support shown in letters provided to the court on his behalf attest to his prior good character.
- That he is remorseful and entered a guilty plea.
- That he has lost his business and reputation.
- That he has suffered the impact of being on remand for an extended time during periods of harsh conditions existing in the correctional facility.

Ancillary Orders

[40] Each of the Crown and Defence have spoken to the issue of appropriate ancillary orders. I will deal with their arguments when I turn to the resolution of those questions at the end of my decision.

Legal Parameters

[41] There is no minimum sentence for manslaughter and in some cases, offenders who have been found guilty or pleaded guilty to manslaughter have not received jail sentences for this offence.

[42] The maximum permissible sentence is life imprisonment. Maximum sentences are typically reserved for the offender who has a serious history of criminal activity, with poor potential for rehabilitation and where the offence was committed in a callous or heinous manner.

[43] So how does a court decide the sentence of an individual when the possibilities are from no incarceration to incarceration for life?

[44] We are guided by the *Criminal Code* and by the decisions other courts have made in the past.

[45] A fit and proper sentence must fall within an established range of sentences for persons who have committed the same crimes in similar circumstances by persons with similar backgrounds. This is why counsel have provided me with various cases to show why, in their respective views, the different sentences they have proposed are consistent with those decisions handed out in other cases. I am assisted in my determination by reviewing and comparing those cases and others to the matter before me.

[46] Decisions of the Nova Scotia Court of Appeal provide important guidance to a sentencing court of the principles that must be applied in making these decisions.

[47] The *Criminal Code of Canada* sets out the purposes and principles of sentencing that a court is required to consider in determining a sentence. I will now describe how the provisions of ss. 718, 718.1 and 718.2 of the *Criminal Code* enter into my analysis.

[48] The sentence that is passed is intended to deter other persons who would be of like mind and in similar circumstances. It must also speak to the public at large with the message that there are significant penalties to pay for crimes of this nature.

[49] The sentence is also intended as an expression of society's denunciation for criminal activity.

[50] These principles, being general deterrence and denunciation, dominate the decision-making in a case like this. A serious crime of violence can only result in a lengthy period of imprisonment. The sentence that has been proposed by the prosecution seeks that I emphasize these objectives of general deterrence and denunciation.

[51] We look too, though, to the circumstances of the offender, Mr. Johnson in this case. The sentence is intended to provide opportunities for people to rehabilitate themselves so that they can live a peaceful and positive lifestyle upon their release, rather than as a continuing threat to the safety of their community.

[52] To assess this potential we consider the past conduct of the offender to gauge how the sentence will support or undermine his return to society as a contributing member of society and not a person to be feared. This is why we obtain Pre-Sentence Reports and consider criminal records and community support for the offender.

[53] In looking at Mr. Johnson's circumstances, it is important to assess whether he is likely to re-offend which includes assessing his insight to his crime, the sincerity of his remorse and his acceptance of responsibility. Pleading guilty is considered to be evidence of the acceptance of responsibility.

[54] I would point out of course that Mr. Johnson expressed in his statement to the court his remorse and acceptance of responsibility as he did to the Pre-Sentence Report author.

[55] However, in some cases, it is necessary to impose jail time because the offender simply has not apprehended the wrongfulness of the conduct and imprisonment is the only way to bring that message home to them; that is, to reinforce that they should not re-offend in the future. This is what we mean by specific deterrence.

Analysis

[56] In summary, we impose sentences that try to balance all of these various factors from the *Criminal Code* and from other cases, so that we can accomplish the overriding goal of protection of the public.

[57] The question before this court then is: What is a fit and proper sentence, that falls within this very broad range of possible sentences, having regard to the circumstances of Mr. Johnson and of his crime?

[58] In conducting my analysis, I am bound by the Agreed Statement of Facts. I must also rely on the submissions of counsel to the extent that any comment on the facts was agreed upon by them.

[59] I will begin first with the issue of rehabilitation and mitigating factors.

[60] Mr. Johnson is a mature man who has lived a largely very positive life. He has pursued appropriate educational certifications, maintained employment throughout his life, employed others and supported his dependants.

[61] He has also contributed to community-based initiatives.

[62] His estranged wife and his mother, as well as others, expressed their "shock" that he committed this crime. There is no suggestion before me that he engaged in any form of domestic violence during his lengthy time with Nancy Johnson or in any other relationship. As such, the evidence before me supports the conclusion that the commission of this crime was atypical behaviour for him. This differentiates him and his conduct from those where an offender has a history of being abusive in intimate partner relationships.

[63] Mr. Johnson has accepted responsibility for his crime and expressed his remorse. Entering a plea of guilty as indicated is a mitigating factor. The prosecution suggests that it is less so in this case because it came after the preliminary inquiry. I am not inclined to that argument. The Indictment originally charged him with second-degree murder and was only reduced after the preliminary inquiry. I cannot go behind the reasons for that decision but I am prepared to infer that the Preliminary Inquiry informed the subsequent decision-making of both counsel as to the appropriate disposition in this matter. In pleading guilty Mr. Johnson saved further stress to the witnesses and family of Mr. Savory and the administrative and financial costs associated with the conduct of a trial of this sort.

[64] The prosecution has also suggested that Mr. Johnson showed a lack of regard or a callousness at the scene by failing to stop and assist. I do not agree with that conclusion. The inference is displaced by his having stopped the vehicle before leaving the scene, driving a short distance back toward the scene and calling out that Mr. Savory should be taken to the hospital. His conduct was consistent with recognizing that medical attention was needed. There were neighbours who were already on scene and well as Ms. Bailey when Mr. Johnson called out.

[65] Frankly, if Mr. Johnson did stay in those circumstances, it may very well have led to more conflict. Whether it was in his mind or not, it was probably wise to avoid mixing with the people on site given what had just happened. He went to his home expecting the police. There is no suggestion that he attempted to abscond or to obstruct the investigation.

[66] There is every reason to believe Mr. Johnson when he says that he intends to return to work, to pay off his debts and to otherwise be a law-abiding citizen upon his release.

[67] For these reasons I conclude that his potential for rehabilitation is strong.

[68] Turning now to the accident and the aggravating factors surrounding this matter.

[69] If I have any concern about Mr. Johnson's reaction to this tragic event, it is that there is some reason to wonder whether he fully apprehends the degree of his responsibility and what it means to the sentencing process.

[70] This was not just an unforeseeable accident. Mr. Johnson was in a highly emotional state arising from his belief that Ms. Bailey was dishonest with him in going to Mr. Savory's house. As the prosecution alleges, his reaction to her conduct was triggered by their domestic relationship.

[71] When Mr. Johnson decided to go to her location, it was while he was, by his own admission, very anxious and suffering from a prescribed drug withdrawal. That does not in law create an excuse, however. There was an opportunity for him to reflect on what he was about to do but he went to Mr. Savory's anyway.

[72] According to the Agreed Statement of Fact, at paragraphs 8 to 11:

8. After Terry Johnson arrived at the residence of Kenneth Savory at approximately 10:30 PM, Ms. Bailey exited the residence and they argued, with neighbours predominantly hearing Ms. Bailey shouting at Mr. Johnson.

9. Mr. Johnson backed down the driveway. Ms. Bailey, standing in the middle of the driveway, yelled at Mr. Johnson to "hit me, hit me!"

10. Mr. Johnson sped back up the driveway, swerved away from Ms. Bailey, and drove toward Kenneth Savory, who had exited his residence holding a 2 x 4 piece of wood in the upright position of a baseball bat.

11. Terry Johnson unintentionally struck Kenneth Savory in the front of his torso with the front end of his truck, with the momentum holding Mr. Savory on the front of the vehicle. As Mr. Johnson drove forward, he clipped the front end of Kenneth Savory's Toyota Celica with his truck.

[73] The Statement of Facts does not provide significant detail. However, a few things have stood out for me:

- There was an argument with Ms. Bailey but there was no act of violence initially.

- Mr. Johnson did demonstrate an intention to leave prior to Mr. Savory's arrival on scene.
- For a reason that has not been explained to me, Ms. Bailey yelled twice at Mr. Johnson to "hit her" which, from my reading of it, acted as a trigger to Mr. Johnson's dangerous operation of his motor vehicle. Clearly, at that point he lost control of his emotions when he "sped up the driveway toward her". That was reckless and dangerous not only to Ms. Bailey but anyone else who could have come into his path.
- Arguably and not raised before me, driving a vehicle in this manner at this time and in this direction toward Ms. Bailey, whether or not he intended to hit her, could have potentially supported a separate criminal charge.
- So this was an act that had already attracted the potential for criminal liability.
- And, of course, we know that, ultimately, that dangerous act lead to Mr. Savory being killed.

Range of Sentences

[74] So having regard to these facts, where does this offence fall in the range of similar sentences?

[75] There is a general view that the range of sentencing in Nova Scotia for manslaughter is 4-10 years, as suggested by counsel for Mr. Johnson.

[76] There are many examples, however, of much greater sentences which have been ordered in this province and also in others - generally in cases where there is a high degree of what we characterize as "moral blameworthiness"; where, for example, a person has a criminal history and there are elements of callousness or extreme violence in the manner in which the crimes were committed. Other factors can include the degree to which the offender instigated the violence that ultimately led to the death of the victim.

[77] I have considered the precedents submitted by counsel. Many of them were joint recommendations, which means that counsel and the court based the sentencing decisions on a common understanding of the facts and the law applicable to those facts. That is not the case here. In this case the prosecution and the offender have

taken vastly different views of what sentence is merited on the circumstances of this offender and this crime.

Intimate Partner Violence

[78] Cases relied upon by the prosecution to support their proposed 10-12 year range on the basis of this being a murder in a domestic relationship included *R. v. Isadore*, 2022 NSSC 209, *R. v. MacKenzie*, 2019 NSSC 67 and *R. v. Quigley*, 2016 BCSC 2184. Each of these may be distinguished on their facts. All three were Joint Recommendations that involved the offender killing a person with whom they were in an intimate-partner relationship. Each case involved significant violence and callous behaviour in the commission of the offence. The circumstances were clearly in the category of manslaughter cases that would be considered to be closer to murder.

[79] It is noteworthy that Mr. Johnson had the opportunity to hit Ms. Bailey, with whom he was in a relationship, with the vehicle but deliberately avoided her. There is no evidence before the court that Mr. Johnson exhibited any other threatening or assaultive behaviours toward her.

[80] As such, the evidence before me supports the conclusion that the commission of this crime was, as I indicated previously, atypical for him. This differentiates him and his conduct from those where an offender has a history of abuse in an intimate-partner relationship.

Accident

[81] Defence counsel suggests a four-year sentence because the circumstances of this offence show it to have been closer to an accident and the circumstances of the offender are otherwise very positive.

[82] I have concluded that this characterization minimizes the moral blameworthiness of Mr. Johnson.

[83] An accident is an unintended, normally unwanted event. The term "accident" implies that nobody should be blamed, but that the event may have been caused by unrecognized or unaddressed risks.

[84] In this case, the risk to the safety of other persons was an obvious risk when Mr. Johnson sped up the driveway in his truck in the direction of Ms. Bailey. Doing that was very dangerous.

[85] In support of this recommendation, counsel for Mr. Johnson compared this offence with a one-punch manslaughter which are the type of cases that attract 4-5 year sentences. With respect, this case does not compare favorably with those decisions.

[86] In cases where a four to five year sentence results, it is usually as a result of a spontaneous reaction such as an exchange of punches in a bar fight. A single punch would not normally be expected to kill someone and yet that can happen. In those cases, there are no weapons or other aggravating circumstances existing.

[87] When one looks at the totality of Mr. Johnson's conduct leading to the death of Mr. Savory, we see that there were a number of bad decisions. It was not a spontaneous reaction that created the situation and the actual act of driving a vehicle at Ms. Bailey was, as I have indicated, inherently dangerous and cannot be compared favorably to punching someone once and killing them.

[88] So what were those circumstances?

- 1) Overall, there was an ongoing loss of control for a significant period of time that included from checking on her whereabouts and travelling to the Dublin Shore.
- 2) Deciding to leave, as he did at one point, was a good decision. However, reversing direction, then turning and running his vehicle at Ms. Bailey was a considered decision, if an impulsive act.
- 3) It was not an exchange of punches - it was directing a car at a pedestrian.
- 4) After striking Mr. Savory, the loss of control by Mr. Johnson was further exhibited by what I infer was a fairly frantic effort to get out the ditch and leave the area, all without apparent regard for where Mr. Savory's body was at that time.

[89] With respect, in my view this case does not compare well with the cases relied upon by the defence.

Driving Cases (Manslaughter)

[90] Counsel have provided me with a third line of cases, mostly from other provinces, wherein cases of a death involving a motor vehicle the range of sentences imposed is from 7 years to 18 years, with one exceptional case provided by the defence in which the sentence was four years.

[91] The prosecution is correct that the use of a "weapon" which in this case the car became, is an aggravating factor that courts have agreed require a sentence to reflect general deterrence. That is, the sentence is intended to warn others that using a car in a dangerous manner to the safety of other persons will have serious consequences.

[92] The prosecution has suggested that this line of cases would support a 12-year sentence for Mr. Johnson.

Remand Credit

[93] In determining sentence, the court under s. 719(3) of the *Criminal Code*, may consider any time spent in custody by the offender as a result of the offence. The calculation of the credit awarded to an offender for time spent in pre-sentence custody is governed by s. 719(3) and (3.1) of the *Criminal Code*.

[94] Credit for pre-sentence custody is discretionary. The general rule, expressed in s. 719(3), is that credit is limited to a maximum of one day for each day spent in pre-sentence custody. Section 719(3.1) creates an exception to that general rule in s. 719(3). The exception may only be granted where the circumstances justify it and the enhanced credit must not exceed one and one-half days credit for each day spent in pre-sentence custody. Section 719(3.2) requires the court to give reasons for any credit granted and shall cause those reasons to be stated in the record.

[95] As such, Mr. Johnson is eligible for a credit to be applied against the sentence imposed for days that he spent in custody in relation to this charge. While both parties would agree that Mr. Johnson should benefit from the 1.5 day exception provided for by 719(3.1), counsel for Mr. Johnson seeks a further credit for time served in accordance with what has been referred to as the "*Duncan Enhancement*".

[96] Counsel for Mr. Johnson submits that the sentence should be further mitigated by the application of this enhancement, a concept I will discuss.

[97] In *R. v. Duncan*, 2016 ONCA 754, the Ontario Court of Appeal recognized that additional credit beyond the 1.5 credit referred to in 719(3.1) is available where the offender serves their pre-sentence custody in particularly harsh circumstances. The court stated at paragraph 6:

... We agree with counsel that in the appropriate circumstances, particularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1). In considering whether any enhanced credit should be given, the court will consider both the conditions of the presentence incarceration and the impact of those conditions on the accused.

[98] As stated in *Duncan*, harsh or punitive remand conditions can be a mitigating factor – that is important language – a mitigating factor in determining sentence. In other words, it is not a deduction from an otherwise appropriate sentence. In *R. v. Marshall*, 2021 ONCA 344, the Ontario Court of Appeal explained at paragraph 52:

The "Duncan" credit is not a deduction from the otherwise appropriate sentence, but is one of the factors to be taken into account in determining the appropriate sentence. Particularly punitive pretrial incarceration conditions can be a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the "Summers" credit will be deducted. Because the "Duncan" credit is one of the mitigating factors to be taken into account, it cannot justify the imposition of a sentence which is inappropriate, having regard to all of the relevant mitigating or aggravating factors.

[99] More recently, in *R. v. Smith*, 2023 ONCA 500, the Ontario Court of Appeal reaffirmed this approach. In delivering the judgment for the court, Fairburn A.C.J.O. wrote at paragraph 52:

... I reiterate this court's comments in *Marshall* that the preferable approach going forward is to address any *Duncan* concerns as a factor in the course of determining the fit and proportionate sentence.

[100] The burden is on the offender to present evidence of the conditions which would support the application of this factor in mitigation. The prosecution does not take issue with the fact that such conditions existed while Mr. Johnson was

incarcerated but asserts that the evidence is lacking to show that they existed for the time periods claimed by Mr. Johnson.

[101] In support of the application counsel for Mr. Johnson provided me with copies of the decisions of this court in relation to *Habeas Corpus* applications brought by persons in custody at Central Nova Correctional Facility, where Mr. Johnson has been incarcerated since June of 2021. I also have reviewed sentencing decisions which speak to this same issue.

[102] In Nova Scotia, courts have recognized that harsh or punitive remand conditions can be a mitigating factor in determining sentence. Further, they have been amply described in a series of decisions that have reviewed and described those conditions for the period that Mr. Johnson has been in custody. These cases, in my view, sufficiently describe those conditions and the reasons. See also:

- *R. v. Steed*, 2021 NSSC 71 (Rosinski J.), at para. 193.
- *R. v. Robinson*, 2021 NSPC 20 (Buckle J.), at para. 44.
- *Downey v. Nova Scotia (Attorney General)*, 2023 NSSC 204 (Brothers J.), at paras. 93-96.
- *Keenan v. Nova Scotia (Attorney General)*, 2023 NSSC 217 (Arnold J.), at para. 1.
- *Richards v. Nova Scotia (Attorney General)*, 2023 NSSC 220 (Arnold J.), at paras 1, 11 and 12.

[103] What is evident from the *Habeas Corpus* decisions is that there was a significant infringement on the liberty of prisoners due to a shortage of staff. *Habeas Corpus*, however, was found not to be an available remedy for these conditions.

[104] In Mr. Johnson's case his counsel states that he was subject to the same conditions as set out in those decisions for all but 181 days in September 2022 to March 2023.

[105] He adopts the description set out by Justice Arnold in *Richards*, at paras. 1, 11 and 12 as describing his experiences. In addition, and specific to Mr. Johnson:

- That he contracted COVID while incarcerated.

- That there were excessive lockdowns.
- That in one period of three weeks he was only out of his cell for 21 hours.
- That there were issues of his being able to communicate with his legal counsel.
- That he was assaulted several times which resulted in him being moved to other units for his safety.

[106] I am satisfied that a fit and proper sentence should reflect these hardships as a mitigating factor. It is my view that this is the correct way in which to apply the principles set out in the *Duncan* case. I am not persuaded to use a formulaic approach as suggested by counsel for Mr. Johnson nor a lump-sum number as suggested by the prosecution.

Conclusion

[107] I am not persuaded by the parties to accept either of their recommendations.

[108] To accept the offender's suggestion that this was akin to the "one-punch manslaughter" sentences is, as I have indicated, to seriously minimize the gravity of this crime. While I am satisfied that he is a very low risk to re-offend, the sentence must be consistent with similar cases and send a clear message to the public that there are serious consequences when someone loses control of their emotions and drives in such a dangerous manner that a person is killed. This is so, even when killing was not the offender's intention.

[109] Neither am I convinced that this should be treated as other murders arising in circumstances of domestic violence. This was a spontaneous and atypical action by an otherwise pro-social person with no history of violence. It took place, as all counsel agree, in a matter of seconds. The use of the motor vehicle was, as I have indicated previously, an aggravating factor. I also agree that the breach of the no-contact order is a factor to be weighed; however, in doing so I have concluded that it does not undermine my conclusion that Mr. Johnson is very likely to return to a life as a law-abiding citizen on his release from custody.

[110] I have concluded that the appropriate range of sentence for this offender in these circumstances is a period of incarceration of between 7 and 10 years.

[111] In view of the many mitigating factors that I have found, including the circumstances of Mr. Johnson's incarceration at Central Nova, the sentence of the court is seven years' imprisonment. There will be a credit of 1259 days calculated as follows:

- (a) Mr. Johnson has been in custody since June 18, 2021 which, by my calculation, amounts to 869 days as of November 3, 2023.
- (b) He is not eligible for a credit for 30 of those days during which he was serving a sentence for the breach of the court order, that being March 2 to April 2, 2022 (2/3 of 45 days).
- (c) The remaining time calculated is on the basis of 839 days.
- (d) Applying the exception provided for in s.719(3.1) of the *Criminal Code*, I am prepared to exercise my discretion and grant a 1.5 day credit for each day on remand, which gives you the total of 1259 days to be taken from the sentence that I just passed.

[112] The Victims of Crime Surcharge is waived due to his significant debt and loss of business, the time in custody and his age.

Ancillary Orders

[113] The Crown is seeking ancillary orders. I have been provided with draft copies in advance and defence counsel Mr. MacLeod has indicated that since our last time in court he has reviewed those orders and they are satisfactory, except for one that is in dispute. I will speak to that at the end.

DNA Order

[114] A DNA order pursuant to s. 487.051(1) of the *Criminal Code* will be ordered. Manslaughter is a primary designated offence and is mandatory under this section so I grant that order.

Forfeiture Order

[115] The prosecution applies for an order pursuant to s. 490.1(a), for the forfeiture of the vehicle used in the death of Mr. Savory that was owned by Mr. Johnson through his landscaping business.

[116] The Crown cites the Nova Scotia Court of Appeal's decision in *R. v. Desmond*, 2020 NSCA 1 as authority for such a forfeiture, referring to paragraphs 52-63. In that case, the Court of Appeal overturned the lower court's decision and ordered forfeiture of the vehicle used in a case of criminal negligence causing bodily harm. The Crown submits that the consequences of Mr. Johnson's actions were more significant than those in *Desmond* as this case involved the loss of life. They submit that Mr. Savory's family should not be subject to seeing the vehicle continuing to be operated in the community. Counsel for Mr. Johnson has indicated that he does not contest the application. I agree with the prosecution and therefore this is an appropriate case for forfeiture and I so order.

Firearms Prohibition Order

[117] A firearms prohibition pursuant to s. 109 of the *Criminal Code* for a period of 10 years is also a mandatory requirement. I grant this order.

Non-Communication Order

[118] Pursuant to s. 743.21, Mr. Johnson is to be prohibited from communicating with Angela Bailey, Chloe Savory, Silas Savory, Frederick Bailey and any other member of Kenneth Savory's immediate family. There is no objection raised and I am satisfied that it is appropriate to do so and I grant this application.

Driving Prohibition Order

[119] There is a request for a driving prohibition pursuant to 320.24(4) for a period of 10 years following Mr. Johnson's release from custody.

[120] This application is actively opposed by the offender on the basis that it is not provided for by the *Criminal Code*. In support of this position, counsel for Mr. Johnson relies on the decision of the Ontario Court of Appeal in *R. v. Boily*, 2022 ONCA 611.

[121] The prosecution relies on a decision to the opposite effect reported as *R. v. Wolfe*, 2022 SKCA 132. The Supreme Court of Canada granted leave to appeal from the *Wolfe* decision on May 25, 2023 (2023 SCCA 16). The issue on which leave was granted is:

Can a driving prohibition be imposed under s. 320.24(4) of the *Criminal Code* following conviction for criminal negligence causing death or bodily harm through the operation of a conveyance?

[122] The issue before the Supreme Court is the same one presented in this application: Can a driving prohibition be imposed under s. 320.24(4) of the *Code* following conviction for an offence which is not mentioned in that section. Like criminal negligence causing death, manslaughter is not an enumerated offence in the section.

[123] As you can see, the issue on the appeal, while not in relation to a manslaughter charge, is relevant to the determination of the current request by the prosecution.

[124] The appeal hearing is scheduled for March 26, 2024. While it is more common recently for the Supreme Court of Canada to provide oral reasons off the Bench or to provide a bottom line decision, that would not necessarily happen and if that does not happen we may expect a delay of several months following the hearing in March before we would have a decision.

[125] The parties have agreed on the form of order should I accept the prosecution's argument.

[Note: Following discussion as to whether to defer the decision on the driving prohibition application until after the *Wolfe* appeal is determined, it was ordered that further consideration of the application be adjourned to April 16, 2024.]

Patrick J. Duncan
Associate Chief Justice

APPENDIX "A"

CRBW 507737

**IN THE SUPREME COURT OF NOVA
SCOTIA**

HIS MAJESTY THE KING

-versus -

TERRY RICHARD JOHNSON

AGREED STATEMENT OF FACTS


The following facts are agreed as proven without the necessity of calling further evidence:

1. On June 17, 2021, Terry Richard Johnson, of Bayport, Lunenburg County, Nova Scotia had been the intimate partner of Carol Angela Smith-Bailey [hereinafter Ms. Bailey] of Lunenburg County, Nova Scotia for approximately two years.
2. Ms. Bailey had also worked with Terry Johnson at his lawn care business for the previous two years, and she was at work for his company during the day of June 17, 2021.
3. On the evening of June 17, 2021, after returning to Mr. Johnson's residence after work, Ms. Bailey told Mr. Johnson that she was going to her own residence to have a shower and pick up some belongings.
4. Ms. Bailey left her two younger children in Terry Johnson's care, and she departed his residence in a minivan belonging to Mr. Johnson, which Ms. Bailey had the use of with permission from Mr. Johnson.
5. After stopping at her own residence, Ms. Bailey proceeded across the Lahave River by ferry and attended the residence of Kenneth Savory at 29 F.C. Dorey Drive, Dublin Shore, Nova Scotia.
6. Kenneth Savory was the former partner of Ms. Bailey and the father of her two older children.

7. Terry Johnson had GPS on the minivan registered to his company that was being used by Ms. Bailey, and suspecting that Ms. Bailey was having an affair, Mr. Johnson left his home in Bayport, Nova Scotia in his Chevrolet Silverado truck, crossed the Lahave River by ferry, and proceeded to the residence of Kenneth Savory.
8. After Terry Johnson arrived at the residence of Kenneth Savory at approximately 10:30 p.m., Ms. Bailey exited the residence and they argued, with neighbours predominantly hearing Ms. Bailey shouting at Mr. Johnson.
9. Mr. Johnson backed down the driveway. Ms .Bailey, standing in the middle of the driveway, yelled at Mr. Johnson to “hit me, hit me!”.
10. Mr. Johnson sped back up the driveway, swerved away from Ms. Bailey, and drove toward Kenneth Savory, who had exited his residence holding a two by four piece of wood in the upright position of a baseball bat.
11. Terry Johnson unintentionally struck Kenneth Savory in the front of his torso with the front end of his truck, with the momentum holding Mr. Savory on the front of the vehicle. As Mr. Johnson drove forward, he clipped the front end of Kenneth Savory’s Toyota Celica with his truck.
12. When Terry Johnson stopped the truck, it was in a dip in the grass past the driveway. Mr. Johnson did not exit his vehicle or check where Mr. Savory was. Mr. Johnson was stuck and drove his vehicle back and forth to free it, driving over the body of Mr. Savory two additional times. Terry Johnson did not initially realize Mr. Savory was under the vehicle, but as he drove over the body of Mr. Savory, Ms. Bailey struck his window with her hands, shouting that Mr. Savory was under the truck.
13. Neighbours immediately went to assist Mr. Savory, but he was already not breathing and had no pulse. Mr. Savory died on June 17, 2021 from blunt force trauma to the chest.

14. Terry Johnson drove down the driveway, then drove partly back up the driveway and shouted for Ms. Bailey to take Mr. Savory to the hospital.

Dated this 3rd day of August, 2023.



Crown Attorney



Crown Attorney



Defence Counsel



Terry Richard Johnson