

CANADA / JUDGMENT

R. v. Macaskill

2023 BCSC 2122

COURT

Supreme Court of British Columbia

DECIDED

14 November 2023

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2023 BCSC 2122 R. v. Macaskill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Macaskill,

2023 BCSC 2122

Date: 20231114

Docket: 69106

Registry: Chilliwack

Rex

v.

Robert Troy Macaskill

Before: The Honourable Madam Justice Walkem

Oral Reasons for Sentence

Counsel for the Crown:

S.J.K. Gill

Counsel for the Accused

A.J. Lagemaat

J.B. Emmons

Place and Date of Trial/Hearing:

Abbotsford, B.C.

November 14, 2023

Place and Date of Judgment:

Abbotsford, B.C.

November 14, 2023

- [1] THE COURT: On March 2, 2023, I convicted Mr. Macaskill of aggravated assault against Frank Paul, contrary to s. 268(2) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] Crown and defence made sentencing recommendations that were quite disparate. The Crown proposed that a sentence of six to eight years was appropriate. Defence, on the other hand, proposed a sentence of 18 to 24 months, to be served within the community through Joshua House, a recovery centre that Mr. Macaskill currently resides at. Defence propose that the first third of the sentence imposed be under house arrest, with Mr. Macaskill only leaving for purposes related to his role in helping others at Joshua House. That the second third be subject to a curfew. And that the final third be served, not under house arrest or curfew, but subject to conditions to keep the peace, be on good behaviour, and undergo counselling or other conditions this court saw fit to impose.
- [3] Circumstances of the offence were outlined in the decision of March 2, 2023. They include the following: Mr. Paul was the victim of the offence. He is a slight-statured Indigenous man who was 52 years old at the time of trial. At the time the assault occurred, he was suffering from an opioid addiction, which arose following treatment for a work injury and motor vehicle accident.
- [4] The assault started in the upstairs unit of a house, where Mr. Macaskill lived in the ground-floor unit. On that day, he had a grandchild, and his then-spouse, in the downstairs unit with him. The upstairs unit was regularly used by squatters, some of whom, would do drugs in the unit.
- [5] Mr. Paul had let himself in, and slept overnight in the upstairs unit. He had used intravenous drugs on the morning of the assault, and had a number of syringes with him.
- [6] When Mr. Macaskill attended to evict Mr. Paul, Mr. Paul was apologetic. Mr. Macaskill struck Mr. Paul in the lower leg with a metal pipe, resulting in severe injury. That initial blow caused injuries so severe that Mr. Paul was unable to walk, causing him to fall down the stairs. He was then, only capable of leaving by pulling himself on his hands, and crawling out of the unit.
- [7] Mr. Macaskill followed Mr. Paul out of the house and continued to strike him, as Mr. Paul attempted to flee.

- [8] Mr. Paul made it to the end of the driveway where he remained. During this time, Mr. Macaskill tried to get Mr. Paul to leave, before there was a need to call the police. For some time, Mr. Paul was crumpled on the ground, in very cold conditions. Mr. Paul was unable to walk, due to the injuries he had sustained, with his head bloodied. Help only came when passers-by stopped and called 9-1-1, and offered Mr. Paul a tarp to cover up with.
- [9] The extent of Mr. Paul's injuries are as follows: a left-sided depressed skull fracture; a left scapula shoulder blade fracture; right tibia and fibula lower-leg fractures; and a left distal humerus upper arm fracture. Mr. Paul underwent several surgeries to address his injuries. He lost some degree of hearing permanently in his left ear, as a result of the skull fracture, and now he uses a hearing aid. He suffers, or has suffered, with an infection in his leg resulting from the lower leg fractures. He took antibiotics, as I understand it, until approximately a month ago, when he underwent another surgery.
- [10] Mr. Paul has sought counselling for the anxiety, and fear he continues to suffer, as a result of the incident. He did not feel comfortable attending court for today's sentencing, by reason of that anxiety.
- [11] A pre-sentence report was presented, as well as submissions of counsel, which highlighted Mr. Macaskill's background and current circumstances. I will briefly review those.
- [12] If my math is correct, being born in December of 1972, you are 50, and born in the Maritimes. Mr. Macaskill's Dad passed when he was five years old. His Mom had a series of boyfriends and a relatively unstable living situation, characterized by addictions and family violence. Mr. Macaskill himself has suffered from alcoholism. Around the time of the offence, he was using crystal methamphetamine, cannabis, and alcohol.
- [13] Subsequent to his arrest, and as a consequence of resolution of a later assault charge he faced, Mr. Macaskill has been in a treatment program and has been able to begin the process of addressing his addiction issues. Mr. Macaskill has a considerable criminal record, which includes charges for theft, forgery, mischief, and breaking and entering. I take particular note that he has had six assault convictions before the conviction I am sentencing him for today, and, subsequent to this assault occurring, was charged with another one on his former common law partner.
- [14] As a result of that particular charge, Mr. Macaskill has spent time at Joshua House, The Creek, which is on a rural property, and removed from any town. He has been able to make progress on his sobriety. Fellow participants in the program, and two supervisors provided supportive letters, highlighting the progress that they have seen him make, and acknowledging his contribution to their community, and his support of the other people there.
- [15] I note that Mr. Macaskill's criminal history includes convictions for breaches or failure to comply with conditions.

Purposes and principles of sentencing

- [16] Sentencing principles are codified in s. 718 of the Criminal Code with the fundamental purpose being to protect society, and to contribute to the maintenance of a just, peaceful, and safe society. The objectives of denunciation and deterrence, as well as those of rehabilitation, reparation, and promoting a sense of responsibility in offenders, are outlined in s. 718.
- [17] Section 718.1, obligates the court to impose a sentence that is proportionate to the gravity of the offence, and the degree of the responsibility of the offender.
- [18] Section 718.2(a) requires the court to take into consideration any relevant aggravating or mitigating factors, including evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.
- [19] In deciding upon an appropriate sentence, the aggravating factors that I have considered include the following:
- the unprovoked and violent nature of the assault;
 - the use of a weapon;
 - the significant and life-altering nature of the injuries suffered by Mr. Paul, including the ongoing hearing loss and anxiety he suffers, and the fact that he has faced an ongoing road of surgeries and medical treatment, and has still not fully recovered, and he will not, to some extent; for example, his hearing;
 - Mr. Macaskill's extensive criminal history, which has included other assaults, and one assault, which happened after this one; and
 - the fact that that criminal history includes breaches and failure to comply with conditions.
- [20] I have taken it very seriously that Mr. Paul, so injured that he could not walk, and with his skull fractured, pulled himself using his hands, and crawling across the ground, in an attempt to get off the property. He was left to suffer like that, in that injured condition on the side of the road, until a passer-by offered help.
- [21] Mitigating factors that I have considered include the following: that Mr. Macaskill has made progress toward his own sobriety. He is doing well at the Joshua House, and has received supportive letters, and is contributing toward that community that he is a part of. As a result of the treatment Mr. Macaskill participated in, he is better able to deal with his addiction issues. People who know him report a change in his demeanour and his approach, particularly over the past six months.
- [22] Mr. Macaskill expressed remorse for the dehumanizing way in which he referred to Mr. Paul as a "junkie", and expressed sorrow for the harm he caused to Mr. Paul and his family.

- [23] I am reviewing a little bit of sentencing principles. I know that I have already done this, but turning again to the principles of the need to protect society and contribute to the maintenance of a just, peaceful, and safe society, again being aware of the objectives of denunciation, deterrence, rehabilitation, reparation, promoting a sense of responsibility, noting that overall a sentence should contribute to those goals. Also noting, as urged by the defence, that sentencing is more of an art than a science, and must be responsive to the individual circumstances of each case, so that while proportionality is an important factor, nonetheless there needs to be a consideration of the circumstances of each case.
- [24] Section 718.2 sets out several principles for the court to take into consideration. Included in that, is that a sentence should be similar to those imposed in similar cases, while at the same time being open to the possibility of different types of sentencing.
- [25] The Crown argued that the appropriate range of sentencing for similar offences is as set out in *R. v. Johnson*, 1998 CanLII 4838 (BC CA), noting that the B.C. Court of Appeal commented at paragraph 10, where they commented on an appropriate range for similar types of charges, and there they said that the appropriate range lies somewhere between 16 months and six years' imprisonment:

Sentences at the lower end of the range tend to be imposed in "fight" situations in which the altercation escalates and results in injuries to the victim. Sentences at the higher end of the range tend to be imposed in situations where the victims are attacked with a weapon, without provocation and without any opportunity to defend themselves.

- [26] The Crown also referred me to *R. v. Craig*, 2005 BCCA 484, where the court discussed this principle further at paragraph 10, saying that:

In determining an appropriate sentence within this broad range, an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end while a consensual fight that has escalated with resulting injury tends to result in a sentence at the lower end

- [27] In *R. v. Hurtado*, 2012 BCCA 47, the Court of Appeal at paragraph 20, suggested that the range for similar offences may be up to eight years, noting:

I am reluctant to agree that the range here was two to six years. Where there is unrestrained violence such as occurred here, coupled with stalking and a surprise attack, I think the lower end is more than two years and the upper end is about eight years, with the possibility of sentencing above eight years in particularly egregious circumstances. This is often a difficult offence for which to fashion an appropriate sentence and I am not attracted to a practice of breaking down the types of aggravated assault and suggesting a relatively narrow range for each type. Sentencing in this area is very subjective having regard to the particular aggravating and mitigating factors which can vary greatly from case to case.

[28] The defence argued that a custodial sentence, albeit served in the community, meets the principles of denunciation and deterrence. Section 742.1 of the Criminal Code, allows the court to order an offender serve a custodial sentence in the community under a conditional sentence order (CSO), providing an opportunity for alternatives to incarceration and opportunities for out-of-jail rehabilitation. Recent amendments to s. 742.1 allow the court to consider a CSO where it was not previously available.

[29] In *R. v. Proulx*, 2000 SCC 5, the Supreme Court of Canada emphasized that a CSO can have a deterrent and denunciation impact at paragraph 22, stating:

The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. It is this punitive aspect that distinguishes the conditional sentence from probation

[Emphasis in original]

[30] In *Proulx*, the Supreme Court addressed the consideration of whether denunciation and deterrence can be served if a conditional sentence is imposed, particularly at paragraphs 114 and 115. There, the court noted that it should not be assumed that because a CSO is being imposed, that the objectives of denunciation and deterrence are not achieved.

[31] In *Proulx*, the court said that in determining whether an offender would endanger the safety of the community, a court must consider the risk of reoffence, and the gravity of the damage should reoffending occur. The risk of reoffending can be mitigated by the imposition of appropriate conditions that support rehabilitation, and institute a level of supervision to ensure compliance; though the Supreme Court did caution that for some violent offences, incarceration may nonetheless be warranted.

[32] I have considered these submissions carefully. I am mindful of the fact that in some circumstances, where an offender has managed a course-correct, and has addressed the factors which led them to the offence in the first place, that those situations may well be a case where imposing a CSO may, in fact, better protect the public and deter further offending in the future, than would imposing a different prison-based sentence. That is to say, there may well be circumstances where we might be doing, in fact, more damage than protection of society when we disrupt an offender's course-correct, where they have been able to turn their life around.

[33] Given the gravity of the offence, history of violent convictions, history of breaches, and failure to comply with conditions, I do not find that this is a circumstance where a CSO would be appropriate.

[34] Mr. Macaskill, please stand.

- [35] After consideration of the circumstances of this case, the gravity of the offence for which you have been convicted, and the lasting impact that the injuries have had on Mr. Paul, as well as the other aggravating and mitigating circumstances set out above, as well as the purposes and principles of sentencing, I sentence you as follows: a four-year custodial sentence with credit for the 66 days served in pretrial at 1.5 time. I understand that this equals a credit of 100 days, although counsel can perhaps correct me on that.
- [36] I order, pursuant to s. 109, I think it is (2)(b) of the Criminal Code, preventing you from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life, and for any firearm, other than a prohibited firearm or restricted firearm, or any cross-bow, restricted weapon, ammunition, and explosive substance for a period of 10 years after you have been released from prison, pursuant to s. 109(2)(a).
- [37] Also, an order that you provide a sample of your DNA, pursuant to s. 487.051 of the Criminal Code. This is a designated offence, and therefore that order is mandatory. Counsel, have I got the number, that 487.051, correct?
- [38] CNSL S. GILL: Yes, sub (3).
- [39] THE COURT: Sub (3).
- [40] CNSL S. GILL: Yes, it's a primary designated offence, thank you.
- [41] THE COURT: It is primary designated, all right. There we go, thank you.
- [42] CNSL S. GILL: Madam Justice, in terms of the jail sentence, the amount, I might have missed the quantum.
- [43] THE COURT: Four years and credit for the 66 days, which I thought Mr. Lagemaat suggested was 100 days.
- [44] CNSL S. GILL: Yes.
- [45] THE COURT: Trusting his math. So five years or four years, rather.
- [46] CNSL S. GILL: Yes.
- [47] THE COURT: Taking into account.
- [48] CNSL S. GILL: Thank you.

"Walkem J."

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