

CANADA / JUDGMENT

R. v. Macaulay

2024 BCSC 2298

COURT

Supreme Court of British Columbia

DECIDED

17 October 2024

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2024 BCSC 2298 R. v. Macaulay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Macaulay,

2024 BCSC 2298

Date: 20241017

Docket: 36619W

Registry: Vancouver

Regina

v.

Kao Daniel Scott Macaulay

Before: The Honourable Justice Whately

Oral Ruling on Detention Review Hearing

Counsel for the Crown:

S. Whyte

Counsel for the Accused:

C.R. Terepocki

Place and Date of Trial/Hearing:

Abbotsford, B.C.

October 17, 2024

Place and Date of Judgment:

Abbotsford, B.C.

October 17, 2024

- [1] THE COURT: Mr. Macaulay is before me for a detention review hearing pursuant to s. 525 of the Criminal Code, R.S.C. 1985, c. C-46. He is detained with respect to Information 98005-1, which contains allegations of aggravated assault against a person named Christian Montes-Cardenas-as well as assault with a weapon and uttering threats, also against the same individual.
- [2] The events leading to the charges against Mr. Macaulay took place on April 14, 2024. I am advised by counsel that, somewhat unusually for these hearings, there is a trial scheduled for Monday, October 21, which is next Monday, four days from now.
- [3] Both counsel for Mr. Macaulay and for the Crown were careful to submit that the fact that the trial is only four days away should not influence the analysis under s. 515 of the Criminal Code as to whether Mr. Macaulay's continued detention is justified, at least in terms of the idea that it is just "a few more days" in custody. I agree with that statement.
- [4] I have had the benefit of reviewing the transcript and ruling for Mr. Macaulay's bail hearing in Provincial Court and I rely on those with respect to the summary of events of April 14, 2024, as alleged by the Crown.
- [5] The circumstances alleged by the Crown are that on the evening of April 14, 2024, Mr. Montes-Cardenas was speaking with a Ms. Katerelos on Clearbrook Road by the Bible College. Mr. Montes-Cardenas said that Mr. Macaulay jumped out holding what appeared to be a machete and struck him several times in his arm and legs with the weapon. Mr. Montes-Cardenas says that Mr. Macaulay then threw a bicycle at him, which may have been Mr. Montes-Cardenas's own bicycle, and said, "I'm not done yet, I'm going to kill you."
- [6] At some point during this altercation, Ms. Katerelos ran away. Mr. Macaulay then ran down Clearbrook towards Maclure Road.
- [7] Police attended at the scene and spoke to Mr. Montes-Cardenas, who identified his attacker as a person named Kao. He said the person had distinctive tattoos, including a cross on his forehead and a tear drop near his eye. Mr. Montes Cardenas also provided other information to the police, including that his attacker lived at an address down the road from where they were, that his attacker had recently been released from prison, and that the attacker had been in a relationship with Ms. Katerelos.

- [8] There was a bystander who heard the altercation but did not see it, who came out and found Mr. Montes Cardenas injured on the ground. There was a security guard who provided some other limited information about seeing a weapon of some kind, and some people fleeing on Clearbrook Road. A police dog tracked to the address on Clearbrook, where it appears Mr. Macaulay was residing.
- [9] Mr. Macaulay was arrested on April 15, 2024, while riding a bus, following a report of a disturbance at Seven Oaks Mall. Mr. Macaulay's initial detention was not without incident. In his May 1, 2024 ruling, Judge Loucks expressed concern about incidents of violence and destruction of property that occurred at the police station, that led to a struggle between police and Mr. Macaulay, and that unfortunately ended with Mr. Macaulay being taken to the hospital.
- [10] Mr. Macaulay appeared before Judge Loucks of the Provincial Court on May 1, 2024, for a bail hearing, but he was ordered to remain in custody.
- [11] In that application the Crown argued, and the judge agreed, that Mr. Macaulay ought to remain in custody. This was primarily based on the secondary grounds, as a result of Mr. Macaulay's lengthy criminal record, which includes violent offences and breaches of court orders, including a conditional sentence order and a period of intermittent sentence, during which Mr. Macaulay was found to be unlawfully at large.
- [12] It was of particular note at the hearing below and in the submissions before me, that Mr. Macaulay had only just been released on April 8, 2024, six days before the events that took place on April 14, 2024, and that he would have been subject to a probation order and a weapons prohibition at the time.
- [13] Mr. Terepocki, counsel for Mr. Macaulay, seeks the release of his client and proposes the following plan, namely that Mr. Macaulay be ordered to stay at his residence on a form of house arrest. He would only leave for the purpose of attending his counsel's office to prepare for trial, to report to a bail supervisor, and to attend NA or AA meetings if available. If I were to agree to release on those conditions, Mr. Macaulay would be subject to random police checks. Otherwise, as currently proposed the efficacy of the house arrest is reliant on Mr. Macaulay's willingness to adhere to that condition.
- [14] Mr. Macaulay can also provide a hundred dollars cash bail, which, while not a large amount, is significant to Mr. Macaulay, who has limited resources as he has been in custody since April of 2024.
- [15] Mr. Macaulay is a 26 or, I believe 27-year-old Indigenous man. He identifies as Sioux Dakota on his mother's side. He has not had an easy life. His mother suffered from addiction and was unable to provide a stable upbringing, and Mr. Macaulay suffered from physical abuse from a stepfather.

- [16] Mr. Macaulay was largely raised by his grandmother. He has been diagnosed with Fetal Alcohol Syndrome and with ADHD. To his credit, he has graduated high school at Yale Secondary. He is the father of two children, who are 13 and 6, which, given Mr. Macaulay's age again demonstrates the challenges that he has faced in his life.
- [17] As stated succinctly by counsel for Mr. Macaulay, addiction is a central factor in Mr. Macaulay's life trajectory from youth onwards.
- [18] Counsel for Mr. Macaulay acknowledges that his client has a lengthy criminal record and that his record was the driving force behind the finding in the court below that Mr. Macaulay should remain in custody. He submitted that the proposed plan should mitigate the risk posed, and that the low bail amount must be considered in light of factors discussed by the Supreme Court of Canada in *R. v. Myers*, 2019 SCC 18, concerning the ability of Indigenous accused to access funds or family supports to access funds for that purpose.
- [19] The Crown takes the same position that it did before Judge Loucks, namely that Mr. Macaulay ought to continue to be detained on the secondary grounds. The Crown submits that Mr. Macaulay has a total of 42 convictions, including youth convictions, with very few gaps in his record. The record is varied in terms of the kinds of offences.
- [20] Of particular concern, in addition to incidents of violence, is Mr. Macaulay's propensity to breach court orders and conditions. I was pointed to a breach of the conditional sentence order, then a termination of same following a second breach, as well as the unlawfully at large during the intermittent sentence. These factors cause significant concern, considering the nature of the plan put forth by counsel for Mr. Macaulay, which essentially relies on Mr. Macaulay's adherence in order to protect the public.
- [21] The location of Mr. Macaulay's residence for the purpose of the house arrest is mere metres from where the events actually took place. The Crown also advised that while electronic monitoring was not proposed as part of Mr. Macaulay's release plan, that too, is a condition that Mr. Macaulay has had in the past and has failed to adhere to.
- [22] The Crown also commented on the strength of its case, pointing to evidence that has been obtained since the first bail hearing, including CCTV camera footage that, while not identifying, does corroborate events as described by the alleged victim. I am advised that the identification in this case is more in line with recognition, and is not solely reliant on the fact that Mr. Macaulay has distinctive tattoos. Mr. Montes-Cardenas, who is also currently in Surrey Pretrial, but in a different unit than Mr. Macaulay, is set to testify that he knew Mr. Macaulay before the events in question.
- [23] Crown submits that trial is set for Monday, October 21, there has been no substantial delay, and proportionality is not in issue. They will likely seek a federal sentence in the range of three to five years.

- [24] The overarching question before the court on a s. 525 detention review is whether the continued detention of the accused is justified under s. 515 of the Criminal Code. The Supreme Court of Canada has been very clear in its jurisprudence that release on bail is the default position and detention pending trial the last resort. This principle of restraint has been codified in s. 493 of the Criminal Code.
- [25] Given the time concerns, I will not repeat a lengthy review of the legal principles as they are well known, but the leading case on the s. 525 detention review hearings is Myers, which was provided to me by counsel for defence and I am familiar with it. It clearly sets out the test and the relevant considerations for a s. 525 detention review hearing.
- [26] I acknowledge the animating principles of the presumption of innocence, the right to reasonable bail, and the importance of release on the least onerous terms that are sufficient to address the relevant bail risk as discussed in the case law.
- [27] A number of factors that I am to consider under Myers are: any new evidence or change in circumstances since the original hearing, the impact of the passage of time or unreasonable delay in getting to trial, proportionality as between time in custody and potential sentence, and the rationale offered for the initial detention. The question before me is whether continued detention is justified.
- [28] The Crown submits that Mr. Macaulay's detention continues to be justified on the same grounds argued in the court below, namely on the secondary grounds, while counsel for Mr. Macaulay submits that he could be released pursuant to the plan he described, which involves a brief period of house arrest prior to the start of trial.
- [29] Neither the Crown nor the defence submitted that there has been any significant change in circumstances since the first hearing, except for perhaps some additional evidence to be adduced at trial, and some changes to the plan proposed by Mr. Macaulay.
- [30] An important consideration on this review is the amount of delay before trial, which appears not to be a factor in this case, as trial is set to commence on Monday. I am satisfied there has not been an unreasonable delay, but I must still consider the proportionality of the time in pretrial custody when compared to the sentence that Mr. Macaulay might receive if convicted.
- [31] The Crown submits that it will likely seek a federal sentence in the range of three to five years, if Mr. Macaulay is convicted. Given the alleged circumstances of the offence and Mr. Macaulay's lengthy criminal record, I do not think that range is outside the range of possible sentences.

- [32] In all the circumstances, I find that Mr. Macaulay's continued detention pending trial is justified on the secondary ground under s. 515 of the Criminal Code. I have considered the guidance of the Supreme Court with respect to Indigenous accused and the population of them in custody. However, I do not consider that Mr. Macaulay's continued detention is disproportionate.
- [33] I simply cannot ignore the risk to the public posed, given Mr. Macaulay's lengthy record. I also do not have sufficient confidence that Mr. Macaulay will be able to adhere to the conditions proposed for the house arrest in his plan. For these reasons the detention order is upheld.

"J. Whately, J."

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