

CANADA / JUDGMENT

R. v. Joseph

2026 ONCA 317

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Joseph

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COA-24-CR-0425

Judges

van Rensburg, Katherine; Gomery, Sally A.; Pomerance, Renee M.

Subject

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Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Joseph, 2026 ONCA 317

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van Rensburg, Gomery and Pomerance JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Cleavon Joseph

Appellant

Breana Vandebeek and Caraid McGinty, for the appellant

Philippe G. Cowle, for the respondent

Heard: April 7, 2026

On appeal from the decision of Justice Nancy L. Dennison of the Superior Court of Justice dated March 19, 2024, with reasons reported at 2024 ONSC 1383.

Pomerance J.A.:

I. OVERVIEW [1] On September 11, 2009, a jury found the appellant guilty of first degree murder. He and his accomplice killed the victim, Jermaine Malcolm, over a \$30 drug debt. Malcolm took drugs from one of the appellant's associates (and co-accused), Andrae Parris, but did not pay. Upon learning about the non-payment of funds, the appellant and Parris went to the residence where they believed Malcolm would be. At the residence, Malcolm was stabbed several times and died. The appellant was sentenced to the mandatory term of life imprisonment with a 25-year parole ineligibility period. Having served more than 15 years of his sentence, the appellant sought a review of his parole ineligibility period, pursuant to what is colloquially called the "faint hope" provision: s. 745.6 of the Criminal Code, R.S.C. 1985, c. C-46. The matter was placed before a judge to screen the application and determine whether there was sufficient merit to warrant a jury hearing. The application judge dismissed the application, finding that the appellant had failed to demonstrate a reasonable prospect that a unanimous jury would reduce his period of parole ineligibility.

[2] The appellant challenges this ruling on appeal, alleging that the application judge made various errors, and that her dismissal of the application was unreasonable.

[3] For the reasons to follow, I would dismiss the appeal.

II. BACKGROUND The Offence

[4] The details of the offence are set out in the decision of this court upholding the convictions of the appellant and his co-accused, Parris: R. v. Parris, 2013 ONCA 515, at paras. 10-23.

- [5] On September 21, 2007, Joseph and Parris were together at Kool Kats, a bar that was a four or five minute drive from the Meadowvale Town Centre complex where the victim Malcolm and his friends were smoking crack. Joseph and Parris were socializing at the bar as well as selling crack cocaine in and from the premises.
- [6] In the early morning hours of September 22, 2007, Parris left the bar with the victim to complete a drug deal. The purchaser was either Malcolm or someone Malcolm knew. The drugs changed hands at the front door of a unit at 6860 Meadowvale. Malcolm took the drugs inside and never returned.
- [7] Parris returned to the bar and spoke with the appellant about what had happened with the drug deal. Shortly before 1:30 a.m. on September 22, 2007, the appellant and Parris left Kool Kats and headed for the Meadowvale complex in search of Malcolm. They learned that he was at the residence of another man, Thomas Teitsson. The appellant went to the front door and Parris went around to the rear.
- [8] The appellant banged on the front door of the unit. A white cloth covered something in the appellant's hand. The appellant yelled that he knew that Malcolm was inside and threatened to shoot up the house if he failed to come to the door. Teitsson opened the front door. The appellant entered. Malcolm appeared and said: "I don't have your money". The appellant punched him in the face with a closed fist.
- [9] Teitsson tried to leave the unit. Parris blocked Teitsson's path. Wielding a steak knife, Parris told Teitsson to get back inside or "you might get some of this". Teitsson retreated to the interior of the unit.
- [10] When Teitsson went back inside the house, the appellant and Malcolm were in the basement. When someone called "Andrae, come down here", Parris went to the basement. Teitsson went upstairs to find a cell phone to call police. He heard a "few thumps" in the basement but no words spoken. A few minutes later, Teitsson called 911 from a neighbour's unit.
- [11] When police arrived, they found Malcolm's body in the basement. Police found a knife handle on the hallway floor near the stairwell into the basement. The missing blade of the knife was on the basement floor. There was blood on the knife blade and on the basement walls. The drywall in the stairwell to the basement was dented and cracked in several places. Police found a second knife with a three-inch blade in the front hallway. There was no blood on this knife.
- [12] Malcolm suffered six stab wounds caused by a knife with a single sharp edge. The deepest wound penetrated 15.5 centimetres into his body. Four stab wounds were inflicted to Malcolm's upper right chest resulting in massive blood loss and played a major role in his death. The pathologist also saw a small cutting wound on the lower left side of Malcolm's neck likely caused by dragging a knife with a serrated edge across the surface of the skin.

[13] The pathologist could not say how many knives had been used in the attack on Malcolm.

The Trial

[14] At trial, the Crown alleged that the killing was first degree murder either because it was planned and deliberate or it occurred during the unlawful confinement of Malcolm or Teitsson.

[15] The appellant and Parris both testified and offered similar accounts. They testified that they drove to the housing unit intending to sell drugs, not to attack Malcolm. They claimed to have been unarmed. They said that a physical struggle broke out between Malcolm and Parris, and that it was Malcolm who was armed with a knife. The appellant intervened to protect Parris and Malcolm got stabbed with his own knife in the struggle. The appellant's account differed only insofar as he claimed to have been waiting in the car outside when Parris first entered the housing unit. He testified that he entered the unit to find out why Parris had not returned, and discovered the two men fighting. The appellant testified that he did not intend to kill Malcolm.

[16] The appellant admitted to stabbing Malcolm but argued that the killing was an act of self defence and/or defence of another (Parris). This was rejected by the jury. Both men were convicted of first degree murder.

The Appeal

[17] On appeal, the appellant argued, among other things, that the jury should also have been instructed to consider the defence of accident. This court rejected that argument, finding the defence of "accident" to be inconsistent with the verdict of the jury, and "unlikely" to have had an air of reality. The appellant also argued that the jury should not have been permitted to consider his unsuccessful guilty plea to second degree murder as an admission in light of the explanation he offered in his testimony. This court rejected that argument as well. This court found that the appellant would have known before entering the plea that the Crown would not accept it. His decision to offer the plea was seen as an "apparently deliberate tactical decision".

[18] The appellant's appeal against conviction was dismissed.

The Faint Hope Application

[19] In 2023, having served more than 15 years following his conviction and sentencing, the appellant filed an application under s. 745.6 of the Code, requesting a hearing before a jury to determine whether his parole ineligibility period should be reduced.

[20] The application judge considered the application record filed in writing. She determined that the appellant had not met the statutory threshold in s. 745.6 of the Code. The appellant failed to demonstrate on a balance of probabilities that there was a reasonable prospect that a unanimous jury would find that his parole ought to be reduced. In other words, the

application judge reviewed the evidence before her and performed a limited weighing of the evidence to determine “whether the [appellant] has shown, on a balance of probabilities, that there is a reasonable prospect that the application will succeed”.

- [21] The application judge noted that the appellant had made some positive changes. He participated in several rehabilitation programs that, for the most part, he performed well in. He has consistently been employed while incarcerated and participated in religious gatherings. His employment reviews were all positive. He obtained his GED and, at the time of this application, was attending university. He also had the love and support of his family. Despite these rehabilitative gains, the application judge was not satisfied that there was a reasonable prospect that he would convince a unanimous jury to reduce his parole ineligibility period, given, among other things, the nature of the offence, the appellant’s conduct while in custody, and his failure to take full responsibility for his role in the offence.
- [22] The details of the application, and the reasons of the application judge will be addressed in more detail below, in connection with the discussion of the issues.

III. POSITIONS OF THE PARTIES [23] The appellant submits that the application judge erred in dismissing his application for review. I would phrase his more specific allegations as follows:

- (1) The application judge misapprehended or attached undue weight to certain items of evidence;
- (2) The application judge applied an unduly stringent screening standard;
- (3) The application judge erred in her assessment of the appellant’s remorse and responsibility;
- (4) The application judge erred in considering the likelihood that the appellant will be deported upon his release;
- (5) The application judge erred by focusing on static factors that would not change, leaving no hope for a future application; and
- (6) The application judge’s decision was unreasonable.

[24] The Crown resists these arguments, submitting that the application judge made no error in her reasoning, or in concluding that the application should be dismissed. The Crown submits that it was open to the application judge to evaluate the evidence as she did, and that her conclusion was reasonable.

IV. ANALYSIS 1. STANDARD OF REVIEW [25] A screening decision under s. 745.6 of the Code is discretionary. Reasonable judges may disagree on whether the standard has been met. It follows that such decisions attract considerable deference on appeal. As was put in *R. v. Atkins*, 2022 ONCA 709, at para 4: “[a]s long as the application judge did not materially misapprehend the evidence, and considered the applicable principles, the result will stand up under appeal unless that result falls outside of the broad range of reasonableness”.

2. THE NATURE OF FAINT HOPE APPLICATIONS [26] The Criminal Code prescribes a procedure for those convicted of certain offences who seek a reduction in their parole ineligibility period. While the decision is that of a jury, there is no automatic right to a jury hearing. Rather, the Code contemplates that a judge of the Superior Court of Justice, designated by the Chief Justice, will assess the merits of the case and determine whether a jury should be empaneled. While the legislation, as originally enacted, did not contemplate judicial screening, that changed over time, as did the test to be applied by the judge screening the application.
- [27] At both the time of the appellant's offence, and his conviction, s. 745.61 provided that a judge screening an application was to direct a jury hearing if the application had "a reasonable prospect" of success. By virtue of amendments made in 2011, the standard was elevated, requiring an offender to demonstrate a "substantial likelihood" of success as a pre-condition to a jury hearing. The 2011 amendments also abolished "faint hope" applications for those who committed their offences after the amendments became law.
- [28] By including a judicial screening mechanism, Parliament sought, among other things, to spare victims' families the agony of participating in unnecessary or frivolous hearings: *R. v. Dell*, 2018 ONCA 674, 364 C.C.C. (3d) 419, leave to appeal refused, [2018] S.C.C.A. No. 389, at para. 20.
- [29] Since this Court's decision in *Dell*, it has been recognized that an applicant is constitutionally entitled to the screening standard that was in place at the time of the offence: see also *R. v. Liu*, 2022 ONCA 460, at para. 6. In recognition of this, and given that Malcolm's murder occurred in 2007, the application judge applied the pre-2011 standard that asked whether the appellant's application had a reasonable prospect, rather than a substantial likelihood, of success.
- [30] The screening application is in writing. No viva voce evidence is heard. The judge is to assess the written material based on the statutory criteria set out in ss. 745.61(2) and 745.63(1):
- (a) the character of the applicant;
 - (b) the applicant's conduct while serving the sentence;
 - (c) the nature of the offence for which the applicant was convicted;
 - (d) any information provided by a victim at the time of the imposition of the sentence or at the time of the hearing under this section; and
 - (e) any other matters that the judge considers relevant in the circumstances.
- [31] As was stated in *R. v. Jenkins*, 2014 ONSC 3223, 310 C.C.C. (3d) 248, at para. 46, the judge who screens an application is not actually predicting what a jury will or will not do:

It is always open to the jury, as a matter of law, to allow an application. This flows from the breadth of the jury's discretion. The question for the screening judge is not whether it is open to the jury to reduce parole ineligibility. That option is available in every case. Nor is the question what a jury will actually do in a given case. That requires a level of prescience that no judge can claim. What we are really asking as judges is whether a jury should allow the application. It remains open to a jury in any case to allow an application, but Parliament has stemmed the tide of cases that will make it to that stage. It has built a judicial dam at the front end of the process.

- [32] If the case does not pass the screening threshold, the application is dismissed without a jury hearing. The judge must determine whether the offender is entitled to bring a future application and, if so, when. A new application cannot be commenced for at least five years under the current provisions but the application judge in this case left open the possibility that the appellant could re-apply in two years, because the provisions in force at the time of the appellant's offence permitted this. The screening decision may be appealed by the applicant or by the Attorney General under s. 745.62 of the Code.
- [33] If the case passes the screening threshold, it is referred to a jury for a hearing under ss. 745.61(5) and 745.63 of the Code. The jury must determine whether there should be a reduction in parole ineligibility, based on consideration of the five criteria listed above. Any decision to reduce the period must be unanimous. If the jury votes unanimously for a reduction, it may recommend a lesser period of parole ineligibility (by a vote of not less than two-thirds of the members of the jury) or terminate the period of parole ineligibility. If the jury declines to reduce the period, it may determine whether a new application can be brought (not sooner than five years or, in relation to offenders convicted of offences committed prior to the 2011 amendments, not sooner than two years) and if so, when. The jury's decision is final; it is not subject to review: *Dell*, at para. 81; *Jenkins*, at para. 12.
- [34] If the jury reduces the period of parole ineligibility, the offender may then apply for parole on or after the new parole eligibility date.
3. NO MISAPPREHENSION OR MISAPPLICATION OF EVIDENCE [35] The appellant submits that the application judge either misapprehended or attached undue weight to: (1) an uncharged incident of violence in the institution; (2) the statistical risk assessments contained in the psychological reports, and (3) the appellant's failure to be transferred to a minimum-security institution.
- [36] The first complaint is that the application judge erred in attaching undue weight to a violent institutional assault that occurred in 2020-2021. According to a psychological risk assessment that was included in the appellant's application materials, the appellant was seen on video holding down an inmate who was then assaulted by another inmate. The appellant argues that the application judge attached too much weight to this incident, which did not lead to any institutional or criminal charges against him.
- [37] I do not agree.

- [38] The application judge expressly adverted to the fact that the appellant was not charged in relation to the incident. It was nonetheless open to her to find this evidence to be “deeply concerning”. The appellant was seen on video participating in a two-on-one attack that left the victim with injuries requiring medical treatment.
- [39] The appellant argues that there might have been an explanation for what he was seen doing on the video. Were that the case, it was open to the appellant to place such explanation before the application judge. He bore the onus to establish a reasonable prospect of success. Absent a mitigating explanation, the violence of the assault spoke for itself, and weighed against the prospect of success before a jury.
- [40] The appellant further argues that the application judge erred in relying on psychological reports that estimated a 31 percent chance that the appellant would be reincarcerated within a year, if released, and a 17 percent chance that he would be involved in violent recidivism within 7 years of release. It is not unusual for institutional records to contain the results of such testing: see e.g. Jenkins, at paras. 45-47; R. v. Campbell, 2026 ONSC 1068, at para. 42. The appellant argues that these results needed to be explained by viva voce evidence. However, screening applications proceed in writing and do not contemplate the receipt of oral testimony. In any event, the application judge properly saw these results as relevant but not dispositive. They were a part of the global picture presented by the appellant at the time of the application.
- [41] Finally, the appellant argues that the application judge placed weight on the fact that he had not yet cascaded down to a minimum-security institution. Again, this does not give rise to error. The application judge acknowledged that: “it is not a prerequisite that an offender be in a minimum-security institution to satisfy the threshold to have a jury consider a reduction in parole ineligibility”. Nonetheless, in this case, the appellant’s failure to cascade down to a minimum-security classification was relevant because it was at least partly attributable to his conduct within the institution: see R. v. Phillips, 2012 ONCA 54, 288 O.A.C. 351, at para. 8.
- [42] One of the psychological reports stated that, while the appellant had made some changes, “his current overall ability and commitment to use the skills required to manage his various risk factors is unchanged and remains needing some improvement”. Another report expressed concern about the 2020-2021 assault committed by the appellant but said that: “[s]hould [the appellant] be able to sustain positive behaviour within the institution, I expect he would be suitable for continued gradual reintegration, with transfer to minimum security being the next logical step”. The failure to cascade down, while not dispositive, was relevant to the likelihood of success before a jury.
4. NO ERROR IN THE APPLICATION OF THE SCREENING STANDARD [43] The appellant argues that the application judge applied too stringent a standard when screening his application, because she relied on the decisions in R. v. Gayle, 2013 CanLII 57631 (Ont. S.C.) and R. v. Banwait, 2019 ONSC 3026. The appellant says that these cases, which pre-dated Dell, applied the higher screening standard of “substantial likelihood” of success. The

appellant submits that, because the application judge relied on these authorities, she improperly imported a higher standard into the analysis.

- [44] The application judge referred to these authorities for the proposition that “a great degree of change must be seen in the offender to justify a departure from the normal terms of the legislative sentence imposed”. This proposition is unrelated to the screening standard. The point taken from Gayle, and repeated in Banwait, was that the jury might look for a greater degree of change in cases involving particularly callous or brutal murders. This is a self-evident proposition that flows logically from the direction in the Code to consider the nature of the offence for which the individual was convicted.
- [45] All murders carry a significant level of moral blameworthiness. The intentional killing of a human being is, by its nature, a crime attracting serious opprobrium. The level of blameworthiness increases where, as here, the killing qualifies as first degree murder, either because of planning and deliberation, or because it was committed during a crime of domination, such as forcible confinement.
- [46] Even within this global category of significant criminality, there are gradations of seriousness.
- [47] The application judge recognized this. The appellant was found guilty of a first degree murder that was committed over a \$30 drug debt. She found that this was a particularly callous crime, that demonstrated a “staggering” lack of morality. It was against this backdrop that she found that that a jury might look for “a great degree of change” before reducing the parole ineligibility period.
- [48] This did not result in the application of the wrong screening standard. To the contrary, the application judge made it clear that she was applying the correct standard. In the very same paragraph in which she cited Gayle and Banwait, she observed that: “[t]he court must determine whether the applicant has sufficiently changed such that the applicant has satisfied the court on the balance of probabilities that there is a reasonable prospect that a jury would unanimously reduce his parole ineligibility period” (emphasis added).
- [49] This ground of appeal must fail.
5. NO ERROR IN CONSIDERING REMORSE OR RESPONSIBILITY [50] The appellant further argues that the application judge erred in finding that he had not demonstrated sufficient remorse, or taken sufficient responsibility for his actions, to warrant a jury hearing. The appellant says that the application judge attached undue weight to his failure to accept the full implications of the trial verdict.

- [51] The application judge did not overemphasize this factor. She acknowledged that: “[t]he applicant is not required to agree to all the facts that formed the Crown’s theory of the case, or the facts found by the jury or court”; and that it is “not a requirement that the applicant accept full responsibility on the basis upon which he was convicted”. She was mindful of the fact that some individuals may maintain that they are not guilty of the offence that the jury found they committed, and that this is not necessarily fatal to the screening process.
- [52] Nonetheless, when an offender does accept full responsibility for the offence, this can weigh in favour of a jury hearing. Conversely, an offender who does not accept full responsibility cannot claim the benefit of this consideration.
- [53] The appellant expressed generalized regret and remorse for his participation in the offence. At trial, he offered a “strategic” willingness to plead guilty to second degree murder. However, his account of the offence bore little resemblance to what the jury clearly found. On the appellant’s account, he reluctantly went to Malcolm’s house at the request of his friend; he only entered the house after his friend entered; and Malcolm “ended up being stabbed”. As noted by the application judge, the appellant’s account was rooted in assertions of accident, self-defence and/or defence of another, all of which were rejected by the jury and by this court on appeal: Parris, at paras. 104-112.
- [54] The appellant was not punished for failing to accept the trial verdict. He was, rather, denied the mitigating effect of taking full responsibility for the offence.
6. NO ERROR IN CONSIDERING POTENTIAL DEPORTATION [55] The appellant submits that the application judge erred by considering that the appellant would face deportation to Trinidad, were he to be granted release on parole.
- [56] It is ultimately for the Parole Board, rather than a jury on a faint hope application, to consider the safety of the community including communities outside Canada, when considering an application for release: *R. v. Spence*, 2025 ONSC 3645, at paras. 52, 67-68; *R. v. Figueroa*, 2024 ONSC 4173, at para. 126; *Collins v. Canada (Attorney General)*, 2012 FC 268, 406 F.T.R. 87, at para. 35.
- [57] Nonetheless, the application judge was entitled to consider that the appellant’s entire support network was situated in Canada. There was no indication that the appellant had family or other social supports in Trinidad. Similarly, there was no indication that the Parole Board would be empowered to supervise the appellant were he to be deported.
- [58] The level of support and supervision that might exist in the community is relevant to screening because it speaks to the likelihood that an offender will maintain rehabilitative progress. Community support can help an offender adhere to a pro-social lifestyle. Supervision ensures accountability.

- [59] While the application judge referred to “consideration of the safety of the community” and held that “the safety of the community is not limited to the community in Canada”, her primary concern was not the safety of persons living in Trinidad but rather, the removal of the appellant from critical sources of support and supervision. This was a relevant consideration and does not warrant appellate intervention.
7. NO ERROR IN CONSIDERING “STATIC” FACTORS [60] The appellant argues that, because the application judge considered “static” factors – factors that will not change over time – she doomed to failure any future application by the appellant. It is true that the application judge considered static factors: the nature of the offence; the uncharged institutional conduct; the psychological risk assessments (based in part on static factors); and the fact that the appellant stands to be deported upon his release from custody. The appellant says that, because these factors will never change, the application judge’s reasons leave no hope, however faint, for the appellant in the future.
- [61] I do not agree.
- [62] The “static” factors considered by the application judge corresponded to the statutory criteria set out in the Code. Moreover, and perhaps more importantly, they were not the only factors considered by the application judge. Rather than extinguishing hope, the application judge encouraged the appellant to keep working toward a potential release, inviting him to re-apply in two years’ time. As she put it in paragraph 90 of her reasons: “[t]hat is not to say that the applicant may never be able to satisfy the threshold, particularly if he does not have any further significant misconducts and continues to pursue his education, his institutional [programming], and maintains his positive employment record”.
- [63] This ground of appeal must fail.
8. THE DECISION WAS NOT UNREASONABLE [64] Finally, the appellant argues that the judge’s application decision was unreasonable, when compared to other cases in which jury hearings have been ordered.
- [65] Other cases are helpful, but only to a point. They are not a perfect metric for assessing the reasonableness of a decision or forecasting success before a jury. Screening is not a mathematical or formulaic exercise. It is a discretionary determination, involving the balancing of factors unique to the case before the court. Each case is different and must be decided on its own facts.
- [66] The decision in this case fell within the range of reasonable outcomes. The appellant has made progress while incarcerated, for which he is to be commended. It is open to him to re-apply for a jury hearing, highlighting those changes that have occurred since the decision of the application judge. However, it was also open to the application judge to find that, as of the time of the application, the positive factors were simply not sufficient to warrant a jury hearing.

[67] The appellant has failed to demonstrate any error that would warrant the intervention of this court.

V. DISPOSITION [68] For all of these reasons, I would dismiss the appeal.

Released: May 5, 2026 “K.M.v.R.”

“R. Pomerance J.A.”

“I agree. K. van Rensburg J.A.”

“I agree. S. Gomery J.A.”

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