

CANADA / JUDGMENT

R. v. McFarlane

2026 ONCA 45

COURT

Court of Appeal for Ontario

DECIDED

21 January 2026

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R. v. McFarlane Collection Decisions of the Court of Appeal Date 2026-01-21 Neutral citation 2026 ONCA 45 Docket numbers COA-25-CR-1428, M56486 Judges Roberts, Lois B. Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. McFarlane, 2026 ONCA 45 DATE: 20260121 DOCKET: M56486 (COA-25-CR-1428) Roberts J.A. (Motion Judge) BETWEEN His Majesty the King Respondent/Responding Party and Sheldon McFarlane Applicant/Appellant Delmar Doucette, for the applicant/appellant Brent Kettles, for the respondent Crown Heard: December 4, 2025 REASONS FOR DECISION

- [1] On December 5, 2025, I issued a short endorsement allowing Mr. McFarlane's application for judicial interim release, with reasons to follow. These are the promised reasons.
- [2] On December 13, 2024, Mr. McFarlane was convicted of manslaughter. The charge arose out of a tussle between him and the victim, who died of a gunshot wound. There was no evidence that Mr. McFarlane had a gun. Mr. McFarlane testified that at the outset of the conflict, the victim had brandished a gun at Mr. McFarlane's friend. He further testified that he grabbed the victim by the wrist and tussled with him in an attempt to de-escalate the situation and take the gun away from him. During the tussle between them, the victim's gun went off and there were other gunshots by others involved in the melee. On December 4, 2025, Mr. McFarlane received a net custodial sentence of 8 years and 1 month. Before this conviction, Mr. McFarlane did not have a criminal record.
- [3] The Crown's opposition to this application focusses primarily on the third prong of s. 679(3), that Mr. McFarlane has not shown that his detention is unnecessary in the public interest. No public safety or flight risks are argued, although Crown counsel highlighted two minor breaches to which Mr. McFarlane pled guilty and received conditional discharges prior to his preliminary inquiry. Crown counsel fairly stated that if I found that any grounds of appeal clearly surpassed the not frivolous threshold, there would be no objection to the application. In that event, the parties agreed on the terms of the draft order.
- [4] In his notice of appeal, Mr. McFarlane asserts four grounds of appeal:

- (1) the jury should have been given another instruction on self-defence that characterized Mr. McFarlane tussling with the victim as the unlawful act of assault that directly or indirectly led to the victim's death;
 - (2) there was an error in the decision tree that instructed the jury to consider the defences of accident and self-defence as conjunctive rather than separate;
 - (3) the jury instruction on after-the-fact conduct was erroneous in that Mr. McFarlane's flight from the scene should not have been left with the jury as after-the-fact conduct; and
 - (4) the verdict was unreasonable: this ground was not argued on this application because the trial transcripts are not yet available.
- [5] I am persuaded that Mr. McFarlane's first ground of appeal clearly surpasses the not frivolous threshold. It is therefore unnecessary for me to address the merits of the second, third and fourth grounds. Self-defence instruction
- [6] No objection is taken with the self-defence or manslaughter instructions that were given to the jury. Mr. McFarlane argues as his first ground of appeal that a further instruction should have been given that characterized the tussling between the victim and him as the unlawful act to be considered in the self-defence analysis. It appears from the recitation of the defence's position in the jury charge that this alternate unlawful act instruction was not raised at his first trial, though I do not have the benefit of the trial transcripts.
- [7] The trial judge instructed the jury to consider Mr. McFarlane shooting the victim in the course of their tussle as the unlawful act in their consideration of the defences of accident and self-defence. It was clear from the jury's verdict of manslaughter that: 1) they rejected the defences of accident and self-defence; and 2) they were not satisfied beyond a reasonable doubt that Mr. McFarlane had the requisite intent for first or second degree murder. Rather, the jury must have been satisfied beyond a reasonable doubt that Mr. McFarlane had caused the victim's death "by means of an unlawful act", pursuant to s. 222(a) of the Criminal Code: namely, in accordance with the jury instructions, the unlawful act of shooting the victim.
- [8] According to Mr. McFarlane, the jury should have been instructed further to consider: 1) whether Mr. McFarlane had caused the victim's death by means of the unlawful act of assault, during which the victim was shot and, 2) if so, whether self-defence applied. As such, the following instruction on self-defence should have been given:
- (1) That Mr. McFarlane believed on reasonable grounds that force was being used or threatened to be used against him or another person.
 - (2) That Mr. McFarlane assaulted the deceased by grabbing his wrist and tussling with him, by means of which the deceased was shot and killed, for the purpose of defending or protecting himself or another person from the use of force.

- (3) That Mr. McFarlane's act of assaulting the deceased by grabbing his wrist and tussling with him, by means of which the deceased was shot and killed, was reasonable in the circumstances
- [9] I note first that if the proposed instruction has an air of reality, trial counsel's failure to put it forward (if that is what occurred here) is not fatal, as it is up to the trial judge to ensure that the jury is properly instructed: *R. v. Doxtator*, 2022 ONCA 155, 161 O.R. (3d) 81, at para. 47, reversed in part but not on this point, 2022 SCC 40, [2022] 3 S.C.R. 263. I also note that assault can be the unlawful act under s. 222(a) that leads to murder: *R. v. Jobidon*, [1991] 2 S.C.R. 714, at para. 38; *R. v. Browne*, 2021 ONCA 836, at para. 50. There is no dispute about the factual underpinnings of this argument, namely, that Mr. McFarlane grabbed the victim's wrist and tussled with him, which could amount to an assault.
- [10] I am persuaded that it is clearly arguable that the proposed instruction has an air of reality. It is therefore clearly arguable that the question of self-defence in the context of the unlawful assault should have been put to the jury to consider.
- [11] As the Supreme Court of Canada instructs in *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 45, it is my task to make only a preliminary but pointed assessment of the grounds of appeal. Having done so, I am persuaded that Mr. McFarlane's first ground of appeal clearly surpasses the non-frivolous threshold.
- [12] Absent public safety or flight risks, which I do not see here, I am further persuaded that the public interest in reviewability at this point outweighs the public interest in enforceability, even in the case of this very serious offence: *Oland*, at para. 51. As the Supreme Court further instructed in *Oland*, at para. 29, where there are no public safety or flight risks, "rarely does [the public interest] component play a role, much less a central role, in the decision to grant or deny bail pending appeal": see, also: *R. v. Ahmed*, 2020 ONCA 572, at para. 7. That is the case here.
- [13] With respect to Mr. McFarlane's prior two breaches of his release terms, I acknowledge that any such breach is serious and that, depending on the breach, it could give rise to residual safety or flight concerns. I do not have those concerns here. I note first that neither breach involved Mr. McFarlane failing to appear when required or committing an offence beyond the breach. The breaches here arose 1) when Mr. McFarlane dropped off his surety before he drove a short distance to his residence; and 2) Mr. McFarlane breached his curfew because the repairs to his car took longer than expected. In both instances, Mr. McFarlane took responsibility for his actions and pled guilty to both breaches. The Crown did not ask that his release be revoked in either instance, and Mr. McFarlane received conditional discharges which have now expired. There were no further breaches.

- [14] I am convinced that public confidence in the administration of justice, as measured through the eyes of a reasonable member of the public, would not be diminished by Mr. McFarlane's release pending appeal, especially as it allows him to continue to engage in prosocial activities like seeing his daughter and working.
- [15] For these reasons, I allowed the application in accordance with the agreed upon draft order. "L.B. Roberts J.A."
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Prepared on 25 October 2026 · Esheria