

# COURT OF APPEAL OF YUKON

Citation: *R. v. Ellis*  
2018 YKCA 4

Date: 20180502  
Docket: 16-YU790

Between:

**Regina**

Respondent

And

**Justina Kristin Ellis**

Appellant

Before: The Honourable Madam Justice Bennett  
(In Chambers)

On appeal from: an order of the Territorial Court of Yukon, dated  
August 30, 2016 (*R. v. Ellis*, 2016 YKTC 44, Whitehorse Docket 15-00036A).

## **Oral Reasons for Judgment**

Counsel for the Appellant:

J. Cunningham  
(via videoconference)

Counsel for the Respondent:

N. Sinclair  
(via videoconference)

Place and Date of Hearing:

Vancouver, British Columbia  
May 2, 2018

Place and Date of Judgment:

Vancouver, British Columbia  
May 2, 2018

**Summary:**

*The appellant applies for an order under s. 684 of the Criminal Code for the appointment of counsel for her appeal. Held: Application granted. Although the appellant did not file an affidavit outlining her financial circumstances, it is clear from the other material before the Court that she cannot pay for counsel. Furthermore, it is in the interests of justice to grant the application. The appellant's grounds of appeal are not frivolous, and she will not have a meaningful opportunity to advance her appeal without counsel.*

[1] **BENNETT J.A.:** Justina Ellis pleaded guilty on April 25, 2016 to one count of robbery (s. 344 of the *Criminal Code*, R.S.C 1985, c. C-46), and one count of choking to overcome resistance for the purpose of committing an indictable offence (s. 246(a)). A psychiatric assessment was done pursuant to the dangerous offender provisions, under s. 752.1. As part of a joint submission, Ms. Ellis was found to be a dangerous offender, received a fixed term sentence of 28 months (less 24 months for presentence remand time), and a ten year long term supervision order. The sentence was imposed on August 30, 2016. Ms. Ellis filed a notice of appeal on October 6, 2016 for conviction and sentence, and an extension of time to file that appeal was granted.

[2] She applies pursuant to s. 684 for the appointment of counsel to conduct her appeals. Her ground of appeal is that she did not understand the consequences of her guilty plea. There was a considerable body of evidence before the sentencing judge in relation to the deficits suffered by Ms. Ellis as a result of Fetal Alcohol Syndrome Disorder, inhaling intoxicants as a child, and a long history of drug and alcohol abuse from childhood.

[3] The Crown submits that Ms. Ellis has not filed any material addressing whether she can afford counsel. The Crown also submits that the evidence is lacking with respect to whether the Yukon Legal Services Society ("YLSS") has refused to fund the sentence appeal.

[4] Section 684 sets out the basis upon which an appointment may be made by a judge of the Court:

684 (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[...]

[5] Normally, an affidavit of financial circumstances is required in order for the Court to assess whether the appellant has sufficient financial means to pay for a lawyer. No such affidavit has been filed. However, there is ample information provided to the Court from presentence reports, medical reports and the *Gladue* report to satisfy me that Ms. Ellis does not have the financial resources to pay for counsel. She has held a job, at most, once, for one month. She has a Grade 7 education. She has never lived in her own home, always relying on others to house her. There is not a scintilla of evidence to suggest she has any means to pay a lawyer, and ample evidence to suggest that she does not, despite not having filed an affidavit.

[6] In addition, the application for funding lingered with YLSS for many months, to the point where I am satisfied on the material filed that YLSS is not funding the conviction or sentence appeal. The two are intricately related, and I see no purpose in delaying this case any further to ascertain that it is not funding the sentence appeal – I am certain it is not.

[7] The next issue is whether it is in the interests of justice to make the order. The interests of justice component is considered on a case-by-case basis, taking into consideration a number of factors relevant to the personal circumstances of the accused, as well as broad societal concerns: *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.) at para. 16. The concept is given meaning in the context of a s. 684 application by Justice Doherty in *Bernardo* at para. 20:

The "interests of justice" referred to in s. 684(1) must take cognizance of the broad access to appellate review contemplated by s. 675 and the wide remedial powers of the court of appeal set out in s. 686. Justice demands that an accused who appeals under s. 675 be afforded a meaningful opportunity to establish the merits of the grounds of appeal advanced by that appellant.

That same interest also insists that the court be able to fully and properly exercise its broad jurisdiction at the conclusion of the appeal. Anything less is inconsistent with the statutory scheme created by Part XXI of the *Criminal Code*.

[8] Factors to consider include the complexity of the case (which refers to the length of the record on appeal, the issues on appeal, and the legal questions engaged); whether there is an arguable case; the ability of the appellant to represent themselves, including their level of education, ability to read and understand the record, ability to understand the applicable legal principles and articulate those principles in the context of the appeal, and ability to make the legal arguments in court; and, whether the Court can properly decide the case without the assistance of counsel, amongst others: see *R. v. Gaber*, 2017 YKCA 5 at paras. 14-24 and *Bernardo* at para. 24 for a discussion of the various factors.

[9] A review of the material suggests that there may not be much merit in the appeal, but it cannot be said to be frivolous. However, the evidence is clear that Ms. Ellis suffers from sufficient deficits that would render her incapable of conducting her own appeal. Her reading and comprehension levels are very low. She would have no ability whatsoever to review the brief record, and articulate the legal issue behind the validity of a guilty plea. The appeal is essentially an application to withdraw her guilty plea and *Ineffective Assistance of Trial Counsel* (Criminal Practice Directive, 12 November 2013), applicable to the British Columbia Court of Appeal, provides a good guide to the steps that need to be taken for this appeal, with the necessary changes. This includes the signing a waiver of solicitor-client privilege, filing her affidavit, having trial counsel prepare and file an affidavit, vetting the affidavit for solicitor-client privilege, preparing a written argument, and making submissions to the Court. It is clear that she does not have the capability of taking any of those steps on her own behalf. In my opinion, this is a case where the interests of justice require that counsel be appointed to conduct the conviction and sentence appeal.

[10] Defence counsel making the application today sought only a limited s. 684 order for a merits analysis. In my opinion, there is no point in requiring defence counsel to return to make a full s. 684 order. If counsel concludes, after reviewing the

affidavits including the affidavit of trial counsel, that the appeal has no merit, then counsel may withdraw and the s. 684 order would be cancelled.

[11] I would recommend, but not require, that counsel outside Yukon be appointed, as the s. 684 applications are administered by YLSS. Defence counsel is now the Executive Director of that Society. There is no suggestion of an actual conflict of interest but, in fact, there may be an appearance of a conflict and two counsel, including Ms. Cunningham, have indicated they feel they should not act on the appeal.

[12] I would not put any fee structure in the order and leave that to be resolved between YLSS and counsel who takes on the appointment.

[13] **BENNETT J.A.:** Therefore, the application is granted with the caveats noted above.

“The Honourable Madam Justice Bennett”