COURT OF APPEAL OF YUKON

Citation: *R. v. Ellis*,
2019 YKCA 10

Date: 20190515
Docket: 16-YU790

Between:

Regina

Respondent

And

Justina Ellis

Appellant

Before: The Honourable Madam Justice E. Bennett
The Honourable Madam Justice S. Cooper
The Honourable Mr. Justice J. Hunter

On appeal from: An order of the Territorial Court of Yukon, dated August 30, 2016 (*R. v. Ellis*, 2016 YKTC 44, Yukon Docket No. 15-00036A).

Oral Reasons for Judgment

Counsel for the Respondent:	L. Whyte
Counsel for the Appellant:	F. Mahon (by videoconference)
Place and Date of Hearing:	Whitehorse, Yukon May 15, 2019
Place and Date of Judgment:	Whitehorse, Yukon May 15, 2019

Summary:

Ms. Ellis appeals her dangerous offender designation and 10-year long-term supervision order. Held: Appeal allowed; new hearing ordered. The sentencing judge erred in law in failing to consider the appellant's future treatment prospects, as the Supreme Court of Canada's decision in R. v. Boutilier, 2017 SCC 64, had not yet been released.

[1] **COOPER J.A.:** Justina Ellis appeals her dangerous offender designation and her 10-year long-term supervision order. She seeks a new hearing, pursuant to s. 759.3(a)(ii) of the *Criminal Code*.

[2] The Crown concedes the appeal and agrees that a new hearing should be ordered.

[3] For the reasons that follow, I would allow the appeal and direct a new hearing.

[4] For the purposes of disposing of the appeal, I find that I need consider only one ground of appeal, that being whether the sentencing judge erred in law in failing to consider the appellant's future treatment prospects in determining that the appellant is a dangerous offender.

[5] On April 25, 2016, the appellant pleaded guilty to a charge of robbery, contrary to s. 344 of the *Criminal Code*; and a charge of strangling with intent to overcome resistance, contrary to s. 246(a) of the *Criminal Code*.

[6] On August 30, 2016, she was sentenced to a global sentence of 28 months' custody less 24 months for pre-trial custody credit. She was also declared a dangerous offender and sentenced to a 10-year long-term supervision order. The sentence of 28 months, the dangerous offender designation, and the long-term supervision order were put before the sentencing judge as a joint submission.

[7] The *Criminal Code* provides that dangerous offender proceedings consist of two stages: a designation stage, during which it is determined if the offender is, in fact, a dangerous offender; and, if a designation of dangerous offender is made, the penalty stage.

[8] The joint submission was, as recognized by the sentencing judge, the result of considerable work on the part of counsel. Unfortunately, neither counsel nor the sentencing judge had the benefit of the Supreme Court of Canada decision in *R. v. Boutilier*, [2017] 2 S.C.R. 936. Pursuant to *Boutilier*, treatment prospects must be considered at the designation stage of dangerous offender proceedings.

[9] In her reasons for judgment, the sentencing judge reviewed the facts of the predicate offences and summarized the evidence before her on the dangerous offender application. In doing so, she discussed the appellant's long-term treatment prospects but only in relation to whether the appellant could be effectively managed in the community. This, of course, is the second stage of a dangerous offender proceeding.

[10] In relation to the designation stage, the comments of the sentencing judge were brief. After discussing the evidence, she stated:

> [24] That is my thought process in arriving at the conclusion that not only am I prepared to adopt the joint submission, but I am fully satisfied that it is the most fair and appropriate outcome in all of the circumstances.
>
> [25] There are a few things I need to do to make that happen. The first of those is that I do need to make the finding that the preconditions for a dangerous offender designation have been made out on the extensive evidence and information before me, and I would so make that a finding.

[11] The reasons for declaring the appellant a dangerous offender do not allow for review of the analysis undertaken in reaching that decision and, accordingly, the appeal must be allowed.

[12] The issue then arises as to what the remedy should be. Section 759(3) of the *Criminal Code* provides that:

> (3) The Court of Appeal may:
>
> (a) allow the appeal and
>
> (i) find that an offender is or is not a dangerous offender or a long-term offender or impose a sentence that may be imposed or an order that may be made by the trial court under this Part, or
>
> (ii) order a new hearing, with any directions that the court considers appropriate; or

(b) dismiss the appeal.

[13] In my view, this Court should not exercise its jurisdiction to either confirm or overrule the dangerous offender designation, or to confirm or vary the long-term supervision order.

[14] As acknowledged by the sentencing judge, the assessment prepared by Dr. Lohrasbe identified factors that speak positively to the appellant's long-term treatment prospects, including the effect of aging and the appellant's capacity to meaningfully engage with therapists, caregivers, and supports.

[15] It is not possible to conclude that, had these factors been considered at the designation stage of the hearing, the decision would have been the same.

[16] Further, this appeal must be considered in the context of the matter having proceeded by joint submission before the sentencing judge.

[17] Accordingly, it is reasonable to conclude that concessions were made that might not have been made and evidence gone unchallenged which might have been challenged had the law been more settled at the time of the hearing.

[18] Finally, counsel have advised that procedural errors in marking exhibits at the sentencing hearing has resulted in this Court not having a complete record of what was before the sentencing judge. This alone favours ordering a new hearing, rather than this Court making findings and passing sentence.

[19] For these reasons, I would allow the appeal and remit the matter to the sentencing court for a new hearing.

[20] **BENNETT J.A.**: I agree.

[21] **HUNTER J.A.**: I agree.

“The Honourable Madam Justice S. Cooper”