

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. J. P. K.-M., 2026 ONCA 146¹

DATE: 20260227

DOCKET: COA-23-CR-0710

Zarnett, Dawe and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

J. P. K.-M.

Appellant

Ian B. Kasper and John-Paul J. Radelet, for the appellant

Avene Derwa, for the respondent

Heard: December 10, 2025

On appeal from the convictions entered by Justice Larry B. O'Brien of the Ontario Court of Justice, on February 26, 2021.

REASONS FOR DECISION

[1] The appellant was convicted of child luring for the purpose of facilitating the commission of an offence under s. 152 of the *Criminal Code*, R.S.C. 1985, c. C-46 (invitation to sexual touching) (count 1), invitation to sexual touching (count 2),

¹ This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46.

child luring for the purpose of facilitating the commission of an offence under s. 163.1 of the *Code* (child sexual abuse and exploitation material offences²) (count 3), possession of child sexual abuse and exploitation material (count 4), accessing child sexual abuse and exploitation material (count 5), and weapons dangerous (count 7). He was sentenced to a global term of incarceration of 34 months, reduced to 12 months after pre-sentence custody and other credits. Certain ancillary orders were also made.

[2] The appellant challenged both his convictions and the sentence, and the appeals were bifurcated. The sentence appeal was heard by a different panel, and succeeded in part. The global sentence was reduced by six months and an ancillary order was amended: *R. v. J. P. K.-M.*, 2023 ONCA 502. We now address the conviction appeal.

[3] The offences relate to interactions between the appellant, who was 19 and 20 years old at the time, and the complainant, who was 14 but told the appellant, in response to his enquiries about her age, that she was 15. In May 2019, they went to a pier, and he asked her to have sex. She declined. In August of that year, they exchanged sexually explicit messages on Instagram over the course of

² Recent legislative amendments replaced the term “child pornography” with “child sexual abuse and exploitation material” in the *Criminal Code*. Although the former terminology was still in use when the appellant was charged, tried, and convicted, these reasons adopt the current terminology.

several days. The appellant requested nude photos, which the complainant provided, and he asked her no less than 20 times to meet in person.

[4] During the time frame of the August communications, the complainant's mother and stepfather became aware of the interactions between the appellant and the complainant. At one point, the stepfather saw the appellant at a bus stop. The appellant messaged the complainant and told her he did not appreciate her stepfather watching him, that he always had a knife on him, and that the next time the stepfather watched him he was "going to flip." A few days later the complainant's mother found the Instagram exchange with the appellant on the family computer, including the explicit photos. The complainant permitted the police to pose as her on her Instagram account to facilitate the appellant's arrest. When the police arrested the appellant, they found a small folding knife in his bag.

[5] The appellant gave a police statement in which he acknowledged sending the Instagram messages, denied wanting a sexual relationship with the complainant, and said he had been joking with her online, including when he asked her to send nude photos. In reference to his followers on Instagram, he stated that "half of them will probably look like they're legal age ... [b]ut they actually aren't." The appellant also stated that he is afraid of his own anger and that if someone yells at him, he could snap and "literally, rip their head off".

[6] As a matter of fact, the complainant was under the age of 16: the age the law generally sets as the minimum age at which a person may give legally effective consent at the time of the offences: *Criminal Code*, s. 150.1(1). At trial, the appellant relied on the proximity of age exception, under s. 150.1(2.1), coupled with a defence of mistaken belief in age. In short, the proximity of age exception allows the accused to rely on the defence of consent if there is less than a five year age gap between the complainant and the accused, and if the complainant was between 14 and 16 years old at the time of the alleged offence.³ Pursuant to s. 150.1(6), an accused may not rely on a mistaken belief that the complainant came within the relevant five year age gap unless the accused took all reasonable steps to ascertain the complainant's age.

[7] In this case, although the complainant was 14 years old at all relevant times, and thus more than five years younger than the appellant, she told him that she was 15 years old.

[8] While the trial judge found an air of reality to the mistaken belief in age defence, he concluded that the appellant did not take reasonable steps, or all reasonable steps, to ascertain the complainant's age. He further found that, at a

³ The exception does not apply if the accused was in a position of trust or authority towards the complainant, if the complainant was in a relationship of dependency with the accused, or if their relationship was exploitative of the complainant. None of these considerations arose here.

minimum, the appellant was reckless as to whether the complainant was old enough to consent.

[9] The appellant also argued at trial that the “private use exception” that was read into s. 163.1 by the Supreme Court of Canada in *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, should be extended to apply to the images the complainant sent to him. If successful, this may have provided him with a defence to the s. 163.1 charges and the charge of child luring for the purpose of facilitating the commission of a s. 163.1 offence. However, on the facts before him, the trial judge found the private use exception did not apply.

[10] In relation to the weapons charge, the trial judge found that on the totality of the evidence, including the appellant’s statements to the police and his Instagram exchanges with the complainant, he was satisfied beyond a reasonable doubt that the appellant had possession of the knife for a purpose dangerous to the public peace.

[11] On appeal, the appellant argues that the trial judge erred in rejecting the mistaken belief in age defence. This argument is relevant to the convictions for child luring for the purpose of facilitating the commission of an offence under s. 152 (invitation to sexual touching) and invitation to sexual touching (counts 1 and 2, respectively). The appellant could not rely on his mistaken belief that the complainant was 15 years old as a defence to the charge in count 3 of child luring

for the purpose of facilitating a child sexual abuse and exploitation material offence because mistake of age would only have been a defence to this offence if the appellant had mistakenly believed that the complainant was at least 18 years old.

[12] The appellant asserts, first, that the judge misapprehended the evidence in finding no objective basis to support the appellant's claim that he believed he was less than five years older than the complainant and could therefore avail himself of the proximity in age exception set out in s. 150.1(2.1). Second, he says the trial judge erred in his analysis of the "all reasonable steps" requirement⁴ by failing to recognize that certain "red flags" identified by the trial judge were as consistent with the complainant being legally able to consent as not. He argues that the trial judge set the reasonable steps standard too high.

[13] We do not accept these arguments.

[14] Under s. 150.1, an accused may rely on the mistaken belief in age defence only where they honestly believed at the time that the complainant was of an age that would permit the accused to rely on consent as a defence pursuant to ss. 150.1(4), (5), or (6), and they took all reasonable steps to ascertain the complainant's age. Where the accused shows an air of reality to both elements,

⁴ With respect to count 1, the appellant submits that he was required to take only "reasonable steps", which is the standard set out in s. 172.1(4) of the *Criminal Code*. The Crown seems to disagree, with its arguments focusing on only the "all reasonable steps" requirement. For the purposes of this appeal, it is unnecessary to determine how the applicable standard may differ between counts. As is set out below, we see no error in the trial judge's conclusion that the appellant not only failed to take all reasonable steps but also failed to take reasonable steps.

the burden shifts to the Crown to negate *either* element, beyond a reasonable doubt: *R. v. Hason*, 2024 ONCA 369, 171 O.R. (3d) 225, at para. 35.

[15] The trial judge found that the appellant had taken neither reasonable steps nor all reasonable steps, notwithstanding his awareness, acknowledged in the police interview, that many of the young people he interacted with (his followers on Instagram) were not of legal age. Despite the presence of obvious red flags specific to the complainant – for example, her need to ask her parents for permission to go places and not being permitted to have her phone at night – he made no further enquiries. We see no error in the conclusion, on this record, that the appellant did not take all reasonable steps or even reasonable steps. Indeed, he can barely be said to have taken any steps at all. A reasonable person in the appellant’s circumstances – an adult of 19 and then 20 years of age who knew he had young female Instagram followers – would have done more to ascertain this young complainant’s age.

[16] The appellant’s argument that the trial judge erred in identifying “red flags” cannot succeed. This court has clearly stated that “[i]nformation that does not reveal the complainant’s precise age is still a red flag requiring further enquiry if it discloses a risk that the complainant might be underage”: *Hason*, at para. 59. The reasonable steps standard was not set “too high” by the trial judge but was firmly anchored in the jurisprudence of the Supreme Court of Canada and this court: see

e.g., *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 9; *R. v. Dragos*, 2012 ONCA 538, 111 O.R. (3d) 481, at paras. 56-59.

[17] Given our conclusion regarding reasonable steps, it is unnecessary to address the alleged misapprehension of evidence by the trial judge regarding the appellant's honest belief that he was less than five years older than the complainant.

[18] The appellant further argues that if he is successful on either or both of the above grounds, a new trial should also be ordered on the child sexual abuse and exploitation material counts. This argument is relevant to the charges for the s. 163.1 offences and child luring for the purpose of facilitating a s. 163.1 offence (counts 3, 4, and 5). He asserts that the "private use" exception set out in *Sharpe* should be extended to nude photos shared between consenting partners where the underlying sexual activity or relationship is not otherwise an offence. Having dismissed the appeal of counts 1 and 2, the appeal on counts 3, 4, and 5 must also fail.

[19] Finally, the appellant argues that the trial judge reversed the burden of proof on count 7, the weapons dangerous count. We do not agree. The trial judge considered the totality of the evidence: the small folding knife found in the appellant's bag upon arrest (which the defence at trial acknowledged was in the appellant's possession); the appellant's admission of extreme anger; and the

appellant messaging the complainant that he would “flip” next time he saw her stepfather watching him. The trial judge reasonably concluded that the appellant carried the knife for more than self defence. While he also commented that there was no basis to conclude that the appellant was “competent” to handle the knife, in the context of the evidence as a whole, this did not amount to a reversal of the burden of proof as alleged.

Disposition

[20] The conviction appeal is dismissed.

“B. Zarnett J.A.”

“J. Dawe J.A.”

“L. Madsen J.A.”