

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McElligott, 2026 ONCA 158¹

DATE: 20260302

DOCKET: COA-24-CR-0507

Zarnett, George and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

James McElligott

Appellant

Michelle Psutka, for the appellant

Stephanie Pak, for the respondent

Heard: February 20, 2026

On appeal from the convictions entered by Justice Graeme Mew of the Superior Court of Justice on October 6, 2023.

REASONS FOR DECISION

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.

[1] The appellant was charged with sexual assault, sexual interference, and firearms offences. At the time of the alleged offences, the complainant was 15. The appellant was 21.

[2] The appellant was acquitted of the firearms offences but convicted of sexual assault and sexual interference. He appeals the convictions, arguing that the trial judge failed to provide sufficient reasons. In the alternative, he requests that the sexual assault conviction be stayed pursuant to *R. v. Kienapple*, [1975] 1 S.C.R. 729.² The Crown concedes the alternative ground only.

[3] At the conclusion of argument, we advised that the appeal was dismissed except, as conceded by the Crown, the conviction for sexual assault was stayed pursuant to *Kienapple*, with reasons to follow. These are those reasons.

[4] The appellant and the complainant started meeting in November, 2020. The complainant testified that over the course of the next two months, sexual activity occurred, progressing through kissing, then “grinding” (simulated sex while the parties were clothed), to oral sex and, on one occasion, intercourse which continued after the complainant told the appellant to stop. The complainant’s age meant that she could not legally consent. There was no mistake of age defence.

[5] The Crown’s case depended principally on the evidence of the complainant, who was vigorously cross-examined. The appellant did not testify; he called one

² The appellant originally appealed his sentence, but he subsequently wholly abandoned the sentence appeal by a Notice of Abandonment dated September 2, 2025.

witness, Aiden Whyman, who testified to a discussion he had with the complainant subsequent to the alleged offences occurring.

[6] Before the trial judge, the appellant argued that the complainant was not credible or reliable. He pointed to, among other things:

(a) that she changed her testimony about the dates on which some of the sexual activity occurred as she was confronted with inconsistencies arising from the timeline she initially described;

(b) that her testimony that she became wary of the appellant after he pressed her to have sex and she said no conflicted with her Instagram messages to the appellant that did not disclose any hesitation about them getting together again;

(c) that her testimony that her memory improved over time, a statement she offered to explain the fact that some of the detail she provided at trial had not been contained in her police statement or preliminary inquiry, did not sufficiently explain her inconsistent evidence, which should be discounted or disbelieved; and

(d) that her evidence of non-consensual intercourse conflicted with Mr. Whyman's evidence that at a party in 2022 (after the appellant had been charged), the complainant said to him that the appellant "didn't rape me but he sexually assaulted me".

[7] The appellant submits that the trial judge's reasons for conviction were insufficient because they do not demonstrate that he grappled with and resolved these inconsistencies and contradictions, leaving the appellant not knowing why the trial judge did not have a reasonable doubt about his guilt.

[8] We disagree.

[9] As the Supreme Court has made clear, a trial judge's obligation to give sufficient reasons in a case that turns on credibility is not the equivalent of a requirement to give "a detailed account of the conflicting evidence". Although some reference to contradictory evidence may be required, the key question is whether the reasons show that the trial judge "seized the substance of the issue" and turned their mind to the "decisive question": *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 50.

[10] The trial judge's reasons show that he identified the decisive question and seized the substance of the issue. He recognized that the essence of the defence was that the complainant's evidence was neither credible nor reliable and could not form the basis for conviction because of inconsistencies and contradictions in her evidence and statements. He was clearly alive to all of the issues about the complainant's evidence raised at trial and relied on in this appeal. His reasons noted or commented on almost all of them.

[11] For example, the trial judge noted that additional detail was provided by the complainant at trial that was not contained in her police statement or preliminary inquiry evidence. He clearly agreed with the general proposition that a witness' memory does not improve over time, contrary to the complainant's explanation. However, while he did not accept that explanation, he noted that to some extent the additional detail had not been earlier requested. The trial judge also reviewed Mr. Whyman's evidence, noting the defence contention that there was a contradiction between what the complainant allegedly said to him and her evidence about non-consensual sexual intercourse. He also reviewed the complainant's evidence about her alleged statement to Mr. Whyman—that she did not recall making the statement and if she said something like that to Mr. Whyman, it was not because it was true but was because she did not want to all of her personal business “aired out to dry”.

[12] The trial judge also noted that defence counsel had put to the complainant in cross-examination that the number of sexual encounters she originally described did not match the record of in-person meetings that took place between the complainant and the appellant.

[13] The trial judge then drilled down on the effect of the inconsistencies, and the way the complainant had responded to any when raised. He expressly noted that the complainant had, on some occasions said something, and when challenged, “refine[d] or even diametrically change[d] her answer”. But the trial judge rejected

the implication that the complainant was being intentionally dishonest, or that she was unreliable on her core version of what occurred. He found that the complainant had not embellished, built up, or fabricated her account and that she gave what she ultimately “believed to be a truthful account to the court”. He found no motive to fabricate (a conclusion the appellant does not challenge). And he found that the complainant was not an unreliable witness—that is, a witness who believed what she was saying but was mistaken in her recollection as to the core events.

[14] The trial judge said:

I am satisfied that [the complainant] is not such a witness in relation to any of the core issues relating to the sexual assault charge. Her descriptions of the sexual activity between her and [the appellant] strike me as both reasonable and credible. The principal inconsistencies in her evidence relate to the number of occasions that sexual activity occurred, and whether certain events occurred on the same day or on separate days. It is clear, however, that there were at least six occasions in November and December 2020 when [the appellant] and [the complainant] were together, possibly seven if there was a meeting on 15 December 2020 (which is not corroborated by the Instagram messages but may still have occurred). But even if sexual activity only took place on two or three of those occasions, I find [the complainant’s] account of the core events can be accepted.

Ultimately, I am satisfied, beyond a reasonable doubt, and so find, that [the appellant] sexually assaulted [the complainant] by touching her breast on one occasion; that he sexually assaulted her by engaging in simulated sex (or grinding) and kissing her on the lips on one or more occasions; that he sexually assaulted [the

complainant] when he performed oral sex on her; and, that he sexually assaulted [the complainant] when he had intercourse with her. In the case of the intercourse, I find that [the appellant] continued to have sex with [the complainant] after she had asked him to stop.

[15] It was open to the trial judge to determine what the “principal inconsistencies” were, and to explain why, in even in light of them, he found the complainant’s evidence credible and reliable on the core events. He was not required to repeat the analysis for every inconsistency raised by the defence, such as when the complainant became wary of the appellant, or the alleged statement to Mr. Whyman. It was clear from his reasons as a whole that he did not consider them to undermine the credibility and reliability of the core of the complainant’s evidence any more than the “principal inconsistencies” he identified.

[16] Read functionally and contextually, the trial judge’s reasons are sufficient. They indicate what was decided and why. They show that the trial judge turned his mind to the relevant factors that went to the believability of the evidence. To conclude otherwise would involve finely parsing the reasons of the trial judge in search of error, something an appellate court should not do: *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 69-70, 82.

[17] We therefore reject the sufficiency of reasons ground of appeal.

[18] As for the alternative ground of appeal, the appellant was convicted of sexual interference and sexual assault. We agree with the parties that the factual

and legal nexus required one of the convictions to be stayed under *Kienapple*. We accept the Crown's concession that the sexual assault conviction should be stayed.

[19] Accordingly, the appeal is dismissed except, as conceded by the Crown, the sexual assault conviction is stayed pursuant to *Kienapple*.

"B. Zarnett J.A."
"J. George J.A."
"J. Copeland J.A."