WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information

that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Chapman, 2016 ONCA 310

DATE: 20160428

DOCKET: C60515

Cronk, Tulloch and van Rensburg JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Michael Chapman

Respondent

Christine Bartlett-Hughes and Hannah Freeman, for the appellant

Brian H. Greenspan and Naomi M. Lutes, for the respondent

Heard: January 7, 2016

On appeal from the acquittals entered by Justice A.J. Goodman of the Superior Court of Justice, sitting without a jury, dated April 30, 2015.

Cronk J.A.:

[1] Following a trial by judge alone, the respondent was acquitted of six sexual offences involving two underage girls: two counts of sexual assault, two counts of sexual interference, one count of invitation to sexual touching and one count of obtaining for consideration the sexual services of a person under the age of 18 years, all contrary to the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*").

[2] The Crown appeals against the acquittals, except the acquittal on the procuring offence. For the reasons that follow, I would dismiss the appeal.

I. Background

[3] The charges against the respondent arose out of incidents that occurred on December 2, 2013, when the respondent, then 40 years of age, picked up two teenage girls who were hitchhiking in Kitchener, Ontario. The girls were 14 and one-half years old (V.T.) and 15 and one-half years old (A.S.) at the time.

[4] While travelling in the respondent's vehicle, the complainants made unsolicited, sexually suggestive comments and engaged in conversation with the respondent about sex, partying, drinking and smoking. They claimed that they had just attended a college party but had missed their ride home. They also said that they were finished high school and, according to the respondent, mentioned that they wanted to go somewhere warm and have "fun".

[5] The respondent drove with the complainants to his parents' home in Kitchener. After the consumption of alcoholic and non-alcoholic beverages, the trio ended up in a hot tub in the backyard. While in the hot tub, A.S. and the respondent engaged in fellatio and sexual intercourse. A short time later, the respondent had sexual intercourse with V.T. in one of the bedrooms at the house.

[6] The respondent then drove the girls to Cambridge. At their request, he stopped to buy them cigarettes and then dropped them off at a local restaurant. He also gave them $10 to buy something to eat.

[7] At trial, the *actus reus* of the offences charged was conceded. There was no dispute that the parties had engaged in the sexual acts alleged and that the complainants had participated willingly. However, since both girls were under the age of 16 years, as a matter of law, they could not consent to the sexual acts. The primary issue at trial, therefore, was whether the respondent could avail himself of the mistake of age defence as set out in s. 150.1(4) of the *Code*. That section reads:

> It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed *unless the accused took all reasonable steps to ascertain the age of the complainant*. [Emphasis added.]

[8] In essence, s. 150.1(4) allows a defence to certain types of sexual activity with a complainant under the age of 16 years based on a mistake of fact as to the complainant's age where the accused has taken all reasonable steps to ascertain age. As the respondent was charged with offences under ss. 151, 152 and 271 of the *Code*, he could only satisfy s. 150.1(4) if, on the trial judge's findings, he honestly believed that the complainants were 16 years of age or more and his belief was honestly held because he had taken "all reasonable steps" to ascertain their ages.

[9] The respondent testified. He said that he honestly and mistakenly believed the complainants had finished high school and were each 17 or 18 years old. He maintained that, based on their appearance, actions and demeanour, and the information they provided to him, he had taken all reasonable steps to ascertain their ages.

[10] The trial judge found that A.S. was not a credible witness and that her memory of certain events was unreliable. He also found that there were internal and external inconsistencies in both her evidence and that of V.T. While he did not accept the entirety of the respondent's testimony, he concluded that it raised a reasonable doubt as to whether the respondent had taken all reasonable steps in the circumstances to ascertain the complainants' ages.

[11] More particularly, the trial judge held that, based on the complainants' demonstrated actions, demeanour, self-professed stated objectives and portrayal of themselves as older than their true ages on the night in question, along with the total "constellation of factors", the respondent was not required to make further inquiries. He therefore concluded that the Crown had failed to meet its burden to prove, to the requisite criminal standard, that the respondent did not take all reasonable steps to ascertain the complainants' ages. Accordingly, he acquitted the respondent of all charges.

II. Issues

[12] There are two issues on appeal:

> (1) Has the Crown raised a question of law alone, entitling it to appeal from the acquittals in question under s. 676(1)(a) of the *Code*?
>
> (2) Did the trial judge err in his consideration of the mistake of age defence under s. 150.1(4) of the *Code*?

III. Parties' Positions

(1) The Crown's Argument

[13] Under s. 676(1)(a) of the *Code*, the Crown's right of appeal from an acquittal is limited to "any ground of appeal that involves a question of law alone".

[14] In *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, the Supreme Court of Canada identified four, non-exhaustive, categories of cases in which alleged shortcomings in a trial judge's assessment of the evidence constitute an error of law, thereby allowing appellate review of an acquittal. Justice Cromwell, writing for the court, described these categories as follows, at paras. 25-32:

> 1) it is an error of law to make a finding of fact for which there is no supporting evidence. However, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule. Rather, it is a conclusion that the standard of persuasion beyond a reasonable doubt has not been met;
>
> 2) the legal effect of findings of fact or of undisputed facts may give rise to an error of law;
>
> 3) an assessment of the evidence based on a misapprehension or misdirection concerning a legal principle is an error of law; and
>
> 4) a failure to consider all the evidence in relation to the ultimate issue of guilt or innocence is also an error of law.

[15] In this case, the Crown acknowledges that, generally, the trial judge correctly stated the legal test set out in s. 150.1(4) and correctly identified the key principles underlying that provision. The Crown also accepts the trial judge's factual findings, as it is obliged to do on an appeal from an acquittal.

[16] However, the Crown submits that the trial judge erred by failing to draw the correct legal conclusion from the facts he found, thus bringing this case within the second category of cases identified in *R. v. J.M.H.* as affording appellate review of an acquittal.

[17] The Crown contends that, on the facts as found by him, the trial judge erred in law in concluding that a reasonable person in the respondent's circumstances would not have made any specific inquiries or taken any active steps to ascertain the complainants' ages. In other words, the Crown asserts that the trial judge erred in articulating and applying the appropriate standard of reasonableness against which the respondent's conduct should be measured.

[18] Specifically, the Crown maintains that many of the indicia of age relied on by the respondent to support his subjective belief that the complainants were over 16 years of age, which were accepted by the trial judge as obviating the

need for further inquiry, were inconclusive and insufficient to lead a reasonable person to conclude that no further inquiry was required.

(2) The Respondent's Argument

[19] The respondent counters with two arguments.

[20] First, he argues that the Crown has not raised a question of law alone upon which to appeal under s. 676(1)(a) of the *Code*. He says the trial judge's conclusion as to whether the Crown established that the respondent had failed to take all reasonable steps to ascertain the complainants' ages amounts to a determination of the ultimate issue, namely, whether the Crown met its burden to establish its case beyond a reasonable doubt. The Crown's appeal, which challenges this conclusion, therefore constitutes a disguised and impermissible attempt to argue that the acquittals were unreasonable.

[21] In support of this argument, the respondent submits that the second category of cases identified in *R. v. J.M.H.*, set out above and relied on by the Crown to ground its appeal, does not licence the Crown to appeal from an acquittal based on an argument that the trial judge's ultimate conclusion was wrong. To conclude otherwise, the respondent says, would run afoul of the principles articulated in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, the presumption of innocence and the Crown's burden of proof in a criminal case. Where, as here, a factual foundation for an acquittal exists, that acquittal is not reviewable based solely on the contention that it was incorrect or unreasonable.

[22] Second, the respondent submits that, in any event, the trial judge did not err. He correctly identified the relevant legal standard under s. 150.1(4) of the *Code* and applied it properly to the facts as found. Further, the evidence supports his conclusion that the respondent took all reasonable steps to ascertain the complainants' ages in all the circumstances.

IV. Discussion

[23] In my view, it is unnecessary to address the first issue raised on appeal. Assuming, without deciding, that the Crown has raised a question of law alone, thereby entitling it to appeal from the respondent's acquittals, I conclude that there is no basis for appellate interference with the trial judge's holding that the evidence at trial raised a reasonable doubt as to whether the respondent took all reasonable steps to ascertain the complainants' ages. I say this for the following reasons.

(1) The Trial Judge Properly Identified the Legal Principles Governing the Mistake of Age Defence

[24] First, I see no error in the trial judge's articulation of the legal principles governing the mistake of age defence under s. 150.1(4) of the *Code*.

[25] The Crown concedes that, generally, the trial judge correctly identified the legal test for the s. 150.1(4) defence and the applicable legal principles underlying the provision. Nevertheless, the Crown points to the following passage from the trial judge's reasons, at para. 44, to argue that he erred in his approach to the defence:

> In essence, *I am required to consider whether* individually or as part of a global assessment of the indicia [of the complainants' ages], and while importing the accused's subjective belief, *a reasonable person would believe that the person was less than 16 years of age, without further inquiry*. If that determination cannot be made on an objective basis, the question becomes what further steps a reasonable person would have had to take in the circumstances. [Emphasis added.]

[26] Based on this passage, the Crown contends in its factum that, in assessing what a reasonable person would have done in the circumstances to ascertain the complainants' ages and whether the indicia of age in this case were sufficient on their own to obviate any need for further inquiry, the trial judge "may have been looking for evidence which would suggest that the [c]omplainants were under 16, rather than indicia that strongly [support] an inference that the [c]omplainants were 16 years or more". This allegedly "less than stringent" approach, the Crown argues, indicates that the trial judge erred: i) by failing to apply a purposive approach to the question whether further inquiry was required concerning the complainants' ages; and ii) by failing to properly assess whether the indicia that the complainants were 16 years or older were truly compelling.

[27] I disagree. Read as a whole, the trial judge's reasons reveal that he appreciated the legal standard established by s. 150.1(4) and that the indicia of age said to relieve against the need for further inquiry must be both compelling in all the circumstances and directed at whether the complainants were more than 16 years of age. I see nothing in his reasons to suggest that the trial judge ignored or misconstrued these requirements in his assessment of the evidence.

[28] In his reasons, the trial judge described the pertinent issues at trial as "whether the accused took all reasonable steps to ascertain the age of the

complainants" and whether he could avail himself of the mistake of age defence provided under s. 150.1(4) of the *Code*: paras. 2 and 23. Later in his reasons, at para. 56, the trial judge provided this description of the s. 150.1(4) mistake of age defence:

> The *Code* demands that those who engage in sexual activity with young persons will make reasonable efforts to ascertain the age of prospective partners. Section 150.1(4) of the *Criminal Code* limits the application of the defence of honest but mistaken belief to cases in which the accused has taken all reasonable steps to ascertain the age of the complainant. This section places an evidential but not persuasive burden on the accused. It requires only that there be evidence, which, if true, would result in an acquittal. *The evidence need only raise a reasonable doubt, but must be directed to "all" the reasonable steps that should have been taken. The jurisprudence provides that the requirement set out in s. 150.1(4) is an earnest inquiry or some other compelling factor which negates the need for an inquiry. Whether an accused took all reasonable steps is fact-specific and depends on the circumstances*. [Emphasis added.]

[29] These comments confirm that the trial judge appreciated the legal test under s. 150.1(4) and the established principles for the application of the mistake of age defence.

[30] The impugned passage from the reasons relied on by the Crown consists of one sentence amidst 16 pages (and 71 paragraphs) of reasons. It precedes the trial judge's correct enunciation at para. 56 of his reasons, quoted above, of the nature and requirements of s. 150.1(4). Notably, at para. 56, the trial judge expressly indicated that the inquiry required under s. 150.1(4) is "an earnest inquiry or some other compelling factor which negates the need for an inquiry" and that the question whether the "all reasonable steps" standard has been met is "fact-specific and depends on the circumstances".

[31] Moreover, the trial judge also explicitly recognized, at para. 63, that: "[t]here must be some compelling factor that obviates the need for an enquiry by the accused" and "the accused's subjective belief [as to the complainant's age] is relevant but not determinative of this question."

[32] Elsewhere in his reasons, at para. 36, the trial judge observed:

> In [*Osborne*], the court held that s. 150.1(4) imposed "more than a casual requirement". The court also noted that the word "all" in respect of referencing "reasonable steps" is important. While it is only necessary for the accused to create a reasonable doubt, the evidence which he uses to establish such doubt must be directed to the word ["all"] as much as to any other part of the subsection.

[33] Finally, throughout his reasons, the trial judge focused on whether the complainants had portrayed themselves as "older than 16". He examined the whole of the evidence bearing on this issue and, as I will detail later in these reasons, made explicit findings regarding the complainants' age-related appearance, statements, behaviour and conduct. These included the following findings, at para. 60:

> It is important to note that *both* [*complainants*] *made unsolicited comments* in the vehicle and at the residence *in tandem with their purposeful portrayal of themselves as* [*women*] *who were older than 16*, interspersed with sexually explicit comments admittedly to entice the accused in their collective attempt to have "fun". [Emphasis added.]

[34] The trial judge's reasons must be read as a whole, rather than in a piece-meal fashion. In my opinion, viewed in their entirety, they belie the Crown's contention that the trial judge erred in his approach to the s. 150.1(4) defence or that he failed to apply the requisite degree of scrutiny to the indicia of the complainants' ages relied on by the respondent.

[35] Accordingly, I am not persuaded that the trial judge erred in the manner urged by the Crown. I would reject this ground of appeal.

(2) The Trial Judge Properly Applied the Section 150.1(4) Standard

[36] Where a mistake of age defence is raised under s. 150.1(4), the accused must point to some evidence that he or she honestly believed the complainant was 16 years or more and that he or she took all reasonable steps to ascertain the complainant's age. If the accused meets this evidentiary burden, the Crown is required to prove beyond a reasonable doubt that the accused did not have the requisite belief or that he or she failed to take all reasonable steps to ascertain the complainant's age: *R. v. L.T.P.* (1997), 113 C.C.C. (3d) 42 (B.C.C.A.), at paras. 16-19; *R. v. Osborne* (1992), 102 Nfld. & P.E.I.R. 194 (Nfld. C.A.), at paras. 47-49 and 61.

[37] In this case, it appears that there was no dispute at trial that the respondent subjectively believed that the complainants were over 16 years of age. The contentious issue was whether he took all reasonable steps to ascertain their true ages.

[38] The trial judge concluded that the evidence at trial raised a reasonable doubt on this core issue and that the Crown failed to meet its burden to prove that the respondent did not take all reasonable steps in the circumstances to ascertain the complainants' ages. The Crown attacks these conclusions on the basis that the indicia of age relied on by the respondent, and accepted by the trial judge, were inconclusive and uncompelling. The Crown argues that the factual circumstances of this case are insufficient to raise a reasonable doubt as to whether the respondent took all reasonable steps to ascertain the complainants' ages, as required by s. 150.1(4), and that a reasonable person in the respondent's circumstances would have made further inquiries.

[39] Again, I disagree. In my opinion, it was open to the trial judge on the record before him to conclude that a reasonable person in the respondent's circumstances would not have made any positive inquiries to ascertain the complainants' ages, based on the compelling indicia of age present in this case.

[40] Section 150.1(4) mandates an inquiry akin to a due diligence inquiry. The analysis involves comparing the steps, if any, taken by an accused to determine the complainant's age with the steps that a reasonable person would have taken in those circumstances: *R. v. Saliba*, 2013 ONCA 661, 304 C.C.C. (3d) 133, at para. 28; *R. v. Dragos*, 2012 ONCA 538, 111 O.R. (3d) 481, at paras. 29-33.

[41] In *R. v. L.T.P.*, the British Columbia Court of Appeal considered those steps that might be reasonable for an accused to take in order to ascertain a complainant's age. The court stated, at para. 20:

> In considering whether the Crown has proven beyond a reasonable doubt that the accused has not taken all reasonable steps to ascertain the complainant's age, the Court must ask what steps would have been reasonable for the accused to take in the circumstances. *As suggested in R. v. Hayes, supra, sometimes a visual observation alone may suffice. Whether further steps would be reasonable would depend upon the apparent indicia of the complainant's age, and the accused's knowledge of same, including: the accused's knowledge of the complainant's physical appearance and behaviour; the ages and appearance of others in whose company the complainant is*

> *found; the activities engaged in either by the complainant individually, or as part of a group; and the times, places, and other circumstances in which the complainant and her conduct are observed by the accused*. … Evidence as to the accused's subjective state of mind is relevant but not conclusive because, as pointed out in *R. v. Hayes* at p. 11, "[a]n accused may believe that he or she has taken all reasonable steps only to find that the trial judge or jury may find differently". [Emphasis added.]

[42] This court has also addressed the issue of what constitutes "all reasonable steps" for the purpose of s. 150.1(4). In *R. v. Duran*, 2013 ONCA 343, 306 O.A.C. 301, at para. 54, Laskin J.A. endorsed the above-quoted comments in *R. v. L.T.P.* He also noted, at para. 52, that "[t]here is no automatic checklist of considerations applicable to every case", that what constitutes "all reasonable steps" depends on the context and the circumstances, and that, "in some cases, an accused's visual observation of the complainant may be enough to constitute reasonable steps."

[43] In *Duran*, the court was concerned with the adequacy of the trial judge's jury instructions on what was required to make out the statutory defence under s. 150.1(4). In that context, Laskin J.A. stated, at para. 53:

> In this case, the trial judge should have instructed the jury to determine whether what the appellant knew and observed about the complainant were all the steps a reasonable person needed to take or whether a reasonable person ought to have made further inquiries. In making that determination, *the jury should have been told to take account of the following considerations and the evidence on them: the accused's observation of the complainant; the complainant's appearance and behaviour; the information the complainant told the appellant about herself, including any information about her age; and the age differential between the appellant and the complainant*. [Emphasis added.]

[44] These instructions, Laskin J.A. emphasized, would focus the jury's deliberations "on the question whether the steps the [accused] had already taken – what he had observed and what he knew – were sufficient without further inquiry": at para. 55.

[45] In this case, the trial judge expressly considered what the respondent had observed and what he knew about the complainants on the night in question. In accordance with this court's directions in *Duran*, he reviewed the evidence of the respondent's observations of the complainants, the complainants' appearance and behaviour and the information the complainants provided to the respondent about themselves and their ages. In so doing, he made the following pertinent findings of fact:

> (1) both complainants made unsolicited, sexually-explicit comments in the respondent's vehicle and at his parents' home, in tandem with their purposeful portrayal of themselves as women who were older than 16 (at para. 60);
>
> (2) by the complainants' own admissions, their sexually explicit comments were made to entice the respondent, in the complainants' self-described attempt to have "fun" (at para. 60);
>
> (3) V.T. admitted that she had no difficulty acting older than her true age, based on her routine, unchallenged purchase of cigarettes and liquor, her size and her appearance (at para. 47);
>
> (4) V.T. acknowledged that, on the night in question, she had actively portrayed herself as older by her physical appearance and demeanour, and by dressing and using makeup to achieve this purpose (at paras. 47 and 49);
>
> (5) V.T. admitted that, while in the respondent's car, the complainants told him they had just been at a college party and missed their ride. She also confirmed that both she and A.S. had made sexually suggestive comments to the respondent, while travelling in his vehicle (at para. 47);
>
> (6) V.T. admitted on cross-examination that she had never informed the respondent about her age, despite her earlier assertion, during her examination-in-chief, that she had done so. This non-disclosure was "consistent with her stated demeanour" on the night in question (at paras. 46 and 61);
>
> (7) similarly, A.S. "purposefully" never provided her age to the respondent. Further, she "acted in a similar manner" to that of V.T. (at para. 61);

> (8) both complainants admitted that they looked and acted older than their actual ages and left the impression that they were older than they in fact were. According to A.S., they were able to do so "without any effort" (at paras. 64 and 65);
>
> (9) for both girls, it was "some badge of honour" to be portrayed as so mature (at para. 64); and
>
> (10) V.T.'s "self-admitted" and A.S.'s "tacit presentation and demeanour" of "wanting to and acting much older than their true ages … was consistent with the [respondent's] passive observations" of the complainants (at para. 65).

[46] The trial judge was also mindful of the significance of the age difference between the respondent (40 years old) and the complainants (14 and one-half years old (V.T.) and 15 and one-half years old (A.S.)). Citing *R. v. R.A.K.* (1996), 106 C.C.C. (3d) 93 (N.B.C.A.), he stated, at para. 37 of his reasons:

> The facts in each situation dictate as to what constitutes reasonable steps in the circumstances. The court [in *R. v. R.A.K.*] also opined at page 96 that the age differential between the accused and the complainant would be relevant in determining whether the steps taken are reasonable as: "almost without exception, the greater the disparity in ages, the more inquiry will be required." Indeed, in this case there is a significant disparity in the ages of the participants.

[47] The trial judge returned to this factor later in his reasons. He noted the respondent's admission that he had not expressly asked the complainants about their respective ages and said, at para. 55:

> The accused testified that he was married at the time with young children. I am not here to judge his morality. *However, the accused's age and the discrepancy here is not lost on me*. [Emphasis added.]

[48] However, given his factual findings about the respondent's observations and the information available to him, the trial judge held that no further inquiries were required to satisfy the "all reasonable steps" standard. He stated with reference to the complainants' evidence, at para. 59:

> The evidence that I accept from the complainants on the issue of all reasonable steps to ascertain their age is that, in the later evening hours, they were boldly hitchhiking, subsequently they requested and were in fact, dropped off close to midnight in another part of the City, they claimed they had just come from a college party and had missed their ride; they openly discussed explicit sexual behaviour with the other sex and with their own gender in the accused's vehicle and without any prompting from him; they discussed having just finished high school and were desirous of consuming alcohol and smoking cigarettes.

[49] The trial judge set out his ultimate conclusion, at para. 66 of his reasons, in these terms:

> It is the second branch of *R. v. W.(D.)* that is at play here. I find that the accused's evidence raises a reasonable doubt. In my opinion, the complainants' demonstrated actions, demeanour and self-professed stated objectives and portraying themselves older than their true ages, along with the constellation of factors did not require further enquiries from the accused.

[50] On the evidentiary record in this case, I see no reversible error in this conclusion. Section 150.1(4) of the *Code* does not require that an accused make every possible inquiry to ascertain a complainant's age in order to successfully mount a mistake of age defence. Nor do the established authorities suggest that an accused must always expressly question a complainant about his or her age, or otherwise seek and obtain conclusive proof of age, in order to avail himself or herself of the s. 150.1(4) defence. Rather, the section requires that *all reasonable* steps be taken to ascertain a complainant's age. As the trial judge recognized, what is "reasonable" will vary, depending on the context and all the circumstances.

[51] In this case, based on the facts as he found them and for cogent reasons that he explained, the trial judge concluded that the evidence at trial raised a reasonable doubt on the central issue whether the respondent took all reasonable steps to ascertain the complainants' ages. In reaching this conclusion, the trial judge recognized that the respondent's and the complainants' credibility and the question whether the complainants had represented themselves to the respondent as over 16 years of age were critical issues. In evaluating these issues, he took express account of the governing

principles regarding the mistake of age defence under s. 150.1(4) of the *Code*, including those set out in *R. v. L.T.P.*

[52] The trial judge also fully canvassed the available indicia of the complainants' ages, as established in the evidence. On his findings, the complainants essentially admitted at trial that they had engaged in a deliberate, premeditated, and successful attempt to present themselves as older than 16. Further, their appearance, actions and words, and the information they conveyed to the respondent about themselves and their ages were specifically designed to achieve this end. The respondent's counsel put it succinctly in their factum:

> The information which was provided to the respondent included that the complainants had finished high school, that they had just left a college party, that they enjoyed smoking, drinking, and partying, that they were sexually open and experienced, and that they intended to have a sexual encounter that night. Their appearance, including their make-up, dress and comportment, was consistent with the information provided. When they returned to the respondent's parent's home, the complainants were sexually forward and acted in a way that was consistent with the age[s] they portrayed.

[53] Of course, this does not mean that a complainant's conduct and appearance will always obviate the need for further inquiry about the complainant's age. A reasonable person would appreciate that underage children may apply make-up and dress and act so as to appear older. However, in this case, it is my view that the combined effect of the evidence of the information provided to the respondent and the observations made by him justified the trial judge's conclusion that the need to inquire further about the complainants' ages was obviated.

[54] Accordingly, in the somewhat unusual circumstances of this case, it was open to the trial judge to conclude, on the compelling factors that he identified, that a reasonable person would have been satisfied that the complainants were over the age of 16, just as the complainants intended, without the need for further inquiry.

V. Disposition

[55] For the reasons given, I would dismiss the appeal.

Released:

“MT”

“APR 28 2016”

“E.A. Cronk J.A.”

“I agree M. Tulloch J.A.”

“I agree K. van Rensburg J.A.”