Feb. 8, 2019

Defence lawyer Tom Singleton had no redirect for Jackson after crown prosecutor Sean McCarroll's cross-examination yesterday. Jackson stepped down.

McCarroll briefly brought Sarah back in to question her about the content of texts between her and Jackson on Dec. 15, 2015. McCarroll asked if she had any recollection of the texts containing anything about Jackson arranging for her to take a test to make up for coursework she had missed. "No, it was the last week of school and they don't do that," she said, adding that it was two days before Christmas break. Singleton had no questions for Sarah.

The court took a brief recess before Singleton began his closing remarks in order to talk to his client.

When they returned to the courtroom, Singleton gave Justice Christa Brothers and the crown a copy of the case R. v. Nyznik, 2017 ONSC 4392. He offered this decision not based on the facts of the case, but rather because of the "excellent summary of the legal framework that I'm suggesting would be appropriate to follow in assessing the evidence that your ladyship heard in this case."

In the Nyznik decision, Justice Molloy talks about the presumption of innocence and proof beyond a reasonable doubt, Singleton said, adding Jackson is presumed innocent. "The burden at all times is on the crown to prove the case against him beyond a reasonable doubt. That burden never shifts to Mr. Jackson. It remains with the crown at all times."

Singleton noted the evidence regarding text conversations between Jackson and Sarah, suggesting "it's almost something that doesn't have much meaning." He said it wouldn't be fair to speculate on the conversations. "The burden was on the Crown to somehow make this stuff relevant …"

He referenced Judge Brothers' ruling on Thursday to allow McCarroll to continue questioning Jackson with "the use of a lot of this information; it was to impeach Mr. Jackson in regard to some things he said."

Brothers clarified she allowed the questioning that the crown had said its purpose was to attempt to impeach Jackson.

Singleton said in her decision, Brothers is going to have to determine how that impacts her finding in regards to the evidence Jackson has entered into the court overall and his answers to questions on cross-examination.

Singleton went back to the legal framework and Molloy's decision in R. v. Nyznik. He noted Molloy talked about the essential elements of sexual assault, which Singleton didn't go over. He also noted where Molloy references the application of the reasonable doubt principle in sexual assault cases, where Molloy refers to R. v. W.D. Singleton read out instruction from that case. "First, if you believe the evidence of the accused, obviously you must acquit. Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit. Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused."

Singleton said that's a well-known instruction and something he is sure that a judge will hear in almost every sexual assault case, in domestic assault cases, and he-said, she-said type of cases. Also in Molloy's decision, Singleton referenced where she discusses "the slogan 'believe the victim.'" Molloy said while the statement has become popular, "it has no place in a criminal trial." Molloy said that would be the "equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence." Singleton said this paragraph puts into context the rules the court has to follow in assessing evidence in this kind of trial.

Singleton then went over "key things" Justice Brothers is going to have to determine in this case. He said the first thing she would have to look at is reliability. He said she would have to ask in looking at Sarah's evidence the

reliability of it. Singleton noted the number of times Sarah answered questions during his cross-examination with “I don’t remember,” or “I don’t recall.” “These weren’t about minute details,” he said. He had asked if she had a class the morning of Dec. 15, 2015. Singleton said she knew she had a class in the afternoon and she had been in school that morning. “Not to remember something as important as where you spent the last 80 odd minutes before you went with him, you got to ask yourself what does that do to her reliability overall with her evidence.”

Singleton then went over the timeline, which he noted is backed up from cell phone records. Singleton noted lunch begins at 11:40 and a text from Jackson to Sarah at 11:42, for which Sarah was not yet in Jackson’s vehicle. They drove up to Burger King on the corner of Kempt Road and Young Street, he said, which they both estimated took approximately five to 10 minutes for the drive. Singleton noted Jackson and Sarah differ on whether or not there was a line-up at the restaurant. Sarah said there wasn’t, which Singleton asserted is reason to assess her credibility and reliability as lunch time would usually be a busy time. They both agreed they sat near the back, had a conversation, and it took approximately 15 to 20 minutes. Singleton said Sarah, at one point, said it could have been just 10 minutes.

Jackson’s account said the drive back to school took five to 10 minutes, Singleton noted, while Sarah had said they took a wrong turn and arrived near Merkel and Agricola where they parked during the middle of the day in a residential neighbourhood. Singleton noted the phone call Jackson received from his wife that lasted approximately four minutes around 12:30. Jackson said he was driving on Agricola at that point, approaching the school. Singleton said if Justice Brothers accepts that timeline, then “where is the time for what [Sarah] claims happened to have happened?” Singleton referred to Sarah’s testimony that she was late for class and the phone call from her phone to Jackson for 37 seconds. Jackson had said this call was to say she was late and he said he would explain it to the teacher. “It’s clear she’s back in the school at the time she makes that phone call.”

“If you accept the timeline, you got to ask yourself when did this occur?”

Justice Brothers clarified Singleton was referring to a call at 11:42 EST/ 12:42 AST.

Singleton said the mention of time zones takes him into his next point. When he was asking Sarah about times of some of these texts and calls and he was mistaken in his belief that the records were in Atlantic Time rather than Eastern Time, therefore presenting her with the wrong times, Sarah was prepared to change the timing, Singleton said. He said Brothers may want to listen to the recording of the case to see what Sarah said at that point.

Brothers asked what Sarah said on the stand.

Singleton said while he was erroneously putting times to her, Sarah said something like, if those times are not right, she'd agree that it didn't happen… Brothers interrupted Singleton to ask what she can make of that. "Because if the witness is confronted with a document which has times and you're purporting to rely on those times, what do I take from the fact that she's accepting those times which, as it turns out, were not proper questions for the witness because they were based on an erroneous assumption. I can't really take anything from that, can I?"

Singleton replied that Brothers is being asked to assess the reliability and credibility of the evidence.

Brothers asked in that exchange where counsel is wrong and putting an erroneous proposition to a witness and the witness doesn't call counsel out to say they have the times wrong, "would it be an error for me to make something of that exchange?"

Singleton moved on to ask Brothers to consider the timeline and location — a residential neighbourhood in the middle of the day. "You got to ask how credible that is."

He then went on to talk about the "false story" Sarah told her boyfriend. Singleton said it bears little to no similarity to what Sarah said in court, and Brothers would have to consider that in terms of her credibility.

Singleton noted Jackson denied all of what Sarah claimed happened at the corner of Merkel and Agricola. He also noted Jackson is not a teacher, which he said that's a mistake both he and McCarroll made in questions they asked. He said Jackson didn't vary on his evidence he gave his court.

Singleton noted McCarroll questioned Jackson about contradictions related to his evidence in court and what he told police about contact between Jackson and Sarah. Singleton noted Jackson, at one point, made reference to not being sure what day police were talking about, and Brothers was going to have to determine what evidence she can accept and what she can't. Singleton said overall, Jackson's account of what he says happened fits well within the timeline, while Sarah's account doesn't.

He said while Brothers may have questions about evidence from both Sarah and Jackson, the judge will have to make assessments about what she can and can't accept here.

"I would suggest, mi'lady, that [Sarah's] evidence is not reliable and it's not credible." Singleton went on to say there is reasonable doubt that "has to be exercised in favour of Mr. Jackson."

McCarroll began his closing remarks, noting Brothers is facing two very different accounts of the events on Dec. 15, 2015. If the court accepts Sarah's testimony to what happened in the car, then all the essential elements of a sexual assault are there, he said. He said the only question from the crown's perspective is whether the court is convinced beyond a reasonable doubt that it did happen. He said R. v. W.D. does apply, going over the same instructions Singleton outlined. McCarroll said he agrees the burden never shifts. He submitted that standard has been established, and there is reason for the court to reject Jackson's evidence.

McCarroll said Jackson testified there was nothing inappropriate regarding his actions and relationship with Sarah, that she was no different than any other student who accessed the student support worker program at Citadel. He noted Jackson's statement that there was nothing wrong with taking students for lunch in his vehicle. However, when his former colleague Cindy Cain took the stand and was asked about doing this, McCarroll said her response was one he would describe as shocked at that suggestion and

said it wouldn't be appropriate. McCarroll argued that is "a common-sense approach." He suggested it was a fundamental shift from Jackson's role as a support worker.

Brothers asked McCarroll how that is relevant to her assessment.

McCarroll said it goes to credibility.

Brothers then referenced a question while Sarah was on the stand regarding whether she ever went for lunch with Cain, to which Brothers said she believed Sarah had said yes.

McCarroll said that may be the case. He noted Cain talked about a family connection between herself and Sarah. They continued to discuss the interactions between them, with McCarroll stating his impression was that they weren't part of her role at the school and instead due to her relationship with Sarah's mother. He returned to the question about driving students to lunch and Cain's response that it was inappropriate.

He said credibility fits in relates to the why Jackson justified his actions, using examples that, from the crown's perspective, weren't equivalent to taking students to lunch. Jackson had mentioned a situation at the school where a fight was brewing and administration asked him to take a student home. The other example he used was at a junior high school and was something organized through the school. "Those examples that he used to in order to justify that behaviour clearly don't fit the behaviour that we're talking about." McCarroll then mentioned the job description in which recommended a student support worker have a vehicle. He said there are all kinds of reasons that might be a recommendation.

McCarroll's next point in regard to Jackson's credibility was his lack of concern regarding having a conversation about with a young female student alone in a public restaurant about a sensitive issue. "He appeared before the court and played that off as if that's no big deal, that's just part of his duties." McCarroll argued that conversation is not a minor deal and it's not something he should have been discussing with Sarah, suggesting he should have been thinking about getting another support worker involved.

McCarroll said there's nothing in the job description that suggests having that type of conversation with a student.

Brothers asked him to make his point again.

McCarroll said it's not a major point. He said it's one of a number of issues to be considered regarding Jackson's credibility. He said Jackson's nonchalance regarding that conversation is not credible. "A male student support worker alone with a young female student in a Burger King restaurant who discloses to him something as personal as she disclosed, that's not something one would expect an individual would have such a nonchalant attitude towards, to act like, oh, this is no big deal. This day was no different from any other day …" McCarroll said. He said this isn't credible from the crown's perspective considering the content of what was discussed and the setting.

McCarroll said Jackson's testimony was ripe with inconsistencies. He noted Jackson testified there was nothing out of the ordinary regarding his relationship with Sarah, and yet, phone records show an estimated (by the Crown) 630 contacts between Jackson and Sarah in the period of Dec. 3, 2015 to Jan. 17, 2016. McCarroll noted the texts were both in the day and at night, including after midnight. He noted a lengthy exchange on Christmas night and a two-hour text conversation after the alleged assault. "This is completely and utterly inconsistent with an appropriate relationship between student and support worker, and it's completely and utterly inconsistent with what he told police when he was being interviewed." McCarroll said that Jackson told police that there was never texting at night. Jackson said he didn't remember texting Sarah on Dec. 15, McCarroll said. There were 186 contacts on that day. "Clearly, something happened that day." "630 messages back and forth between the period and he tells the police, 'I don't remember.'"

McCarroll then talked about the phone call from Sarah on Dec. 15 at 12:42; Jackson testified Sarah said during that call she was late for class and needed him to explain it to the teacher. However, McCarroll noted, Jackson told police they weren't late coming back from lunch. McCarroll argued that a phone call in itself was unusual for their relationship, with most communication taking place through text. "The fact that that was a phone

call is in of itself unusual." He said that phone call followed what should have been an unusual and memorable conversation for Jackson. "These two events, I would submit, ought to have solidified … and stood out." McCarroll went on to say, three years later on the witness stand, and Jackson now remembers a phone call and its content. "I would submit that this is a significant inconsistency."

Brothers asked about Sarah's testimony in which she said she didn't recall that phone call and suggested it may have been a pocket dial.

McCarroll said he has notes on that and would prefer to come back to that when he goes over Sarah's testimony.

McCarroll then went back to Jackson's statement to police, in which he said he couldn't remember who brought up the abortion. McCarroll said this is inconsistent with his evidence in trial, during which he said he had no idea about the abortion until the Burger King conversation. He argued one would expect Jackson to remember who brought it up, as it would have been Sarah if Jackson didn't know about it previously. He argued that with these significant inconsistencies, the court ought to reject Jackson's evidence.

McCarroll went on to talk about Sarah, stating her credibility wasn't seriously challenged. There was no suggestion put to her that her allegation was fabrication, nor a reason for her to fabricate it, McCarroll said. There also was no evidence of exaggeration, he said. He noted that during cross-examination, she was asked about the doors in the car being locked and she said only one was locked. She was also asked if her hair was pulled, and she said no. McCarroll suggested these were opportunities to exaggerate and she didn't.

McCarroll went on to talk about Sarah's responses of "I don't remember." McCarroll said he disagreed with the classification that these weren't minute details. Whether she had a class that morning doesn't matter, he said. "That's not something she should be expected to remember." She also didn't remember if he was at the car when they went to lunch, which McCarroll also argued doesn't matter. She didn't remember if she used her phone at Burger King. "That has nothing to do with a sex assault that occurred in a car over the lunch hour." He noted she didn't remember her

one of her teachers' name. "Quite frankly, I don't remember my [names class] teacher's name." Sarah didn't remember the pants Jackson was wearing; inconsequential, McCarroll argued. She didn't remember if Jackson asked her to buy lunch, nor the call in the car. "All of these are minor details that she should not be expected to remember."

Sarah testified about feeling frozen, McCarroll noted, when her hand was put on Jackson's crotch. She testified about trying to process what was happening and how to deal with it. "She handled it exactly as one would expect." McCarroll said the days of expecting sexual assault victims to fight or run are long gone, and her behaviour is what one would expect from an 18-year-old girl forced into a situation by an older man.

McCarroll then went on to talk about Sarah's testimony regarding why she was texting with Jackson after the alleged assault, in which she said she was in shock, embarrassed, and didn't know what was going to happen. He said this was consistent with what one would expect.

McCarroll referenced R. v. A.R.D., 2017 Alberta Court of Appeal 237, which discussed what a lack of avoidant behaviour can tell a trier of fact. He quoted a line in that decision that said, "The more important question is what, if anything, can evidence of a lack of avoidant behaviour by a complainant tell a trier of fact about a sexual assault allegation? The answer is simple—nothing." He argued that the court can take nothing from the fact that Sarah engaged in a phone call and texts after the alleged assault.

McCarroll then went on to talk about Singleton's comments regarding Sarah's disclosure to her then-boyfriend. McCarroll said the extent of the inconsistencies was minimal. He read out the conversation between Sarah and the boyfriend. McCarroll said Sarah explained why she didn't tell her boyfriend the whole truth. He referenced R. v. D.T. Ontario Court of Appeal, which said the court shouldn't rely on incremental disclosure as an indicator of credibility or reliability. "The manner in which she disclosed to [her boyfriend] is completely consistent with what one should expect, and there's no adverse inference that can be drawn."

McCarroll said the court can be comfortable with accepting with Sarah's evidence. McCarroll then spoke about Sarah's mother's evidence, during which she described driving around the neighbourhood where the alleged sexual assault happened. She testified about the emotional and physical reaction she saw in her daughter. "As they approached the area where [Sarah] said that this happened, she became physically ill." She became nauseated, McCarroll said, arguing this is compelling evidence. She asked her mother to take her home, he said. Cain also testified that Sarah showed the same type of emotion when she disclosed to her, he noted.

Brothers asked McCarroll to address the text to the boyfriend in which Sarah spoke about Jackson driving other people home and she was last, an inconsistency with her court evidence.

McCarroll said her explanation was that she felt somewhat guilty about the situation she had gotten into. He argued it's not an inconsistency, rather piecemeal disclosure.

Brothers asked Singleton if anything was arising from McCarroll's remarks.

Singleton briefly commented that case law says you can't expect sexual assault victims to act in any particular way, that you don't consider it.

Brothers reserved her decision, meaning she will read more case law and think about the evidence before coming to a verdict. She asked what counsel's time is like the week of March 11. Singleton said he's away for the month of March and suggested a colleague could take his place for the reading of the decision. Brothers noted she is triple-booked for the month of April. They took a brief recess to look at courtroom availability for the week of March 11 and May 6. After they returned, Singleton said Jackson would prefer Singleton be there for the reading of the decision. The decision was reserved for May 8 at 10 a.m.