

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

v.

JACK DENSMORE

E X C E R P T O F
P R O C E E D I N G S A T T R I A L
I N C A M E R A

BEFORE THE HONOURABLE MR. JUSTICE J. KRAWCHENKO
on May 28, 2024 at HAMILTON, Ontario

**INFORMATION CONTAINED HEREIN CANNOT BE PUBLISHED,
BROADCAST OR TRANSMITTED PURSUANT TO SECTION 486.4
AND 278 OF THE CRIMINAL CODE OF CANADA BY
ORDER OF THE HONOURABLE MR. JUSTICE KRAWCHENKO,
SUPERIOR COURT OF JUSTICE**

APPEARANCES:

B. Sosa

Counsel for the Crown

M. Fahmy

Counsel for Jack Densmore

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E X H I B I T S

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Legend

[sic] indicates preceding word has been reproduced verbatim and is not a transcription error.

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(ph) indicates preceding word has been spelled phonetically

All spellings of names are transcribed as set out in the reporter's notes unless noted with a
(ph)

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Transcript Ordered August 7, 2024
Transcript Completed September 16, 2024
Ordering Party Notified September 16, 2024

1.
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In Camera

TUESDAY, MAY 28, 2024

5 CLERK REGISTRAR: This court has ordered that the
identity of the complainant or any information
that could disclose the identity of the
complainant shall not be published in any document
or broadcast in any way, and pursuant to Section
278 there is an order directing that the contents
of any application any evidence taken information
10 given submissions made or any decision or reasons
provided by the court shall not be published in
any document or broadcast or transmitted in any
way. Thank you, Your Honour.

THE COURT: Thank you.

15 MR. SOSA: Good morning, Your Honour.

THE COURT: Good morning.

MR. SOSA: For the record, Sosa, S-O-S-A, initial
B. We are here for the trial continuation of Mr.
Densmore. Your Honour, at the last appearance the
20 last exhibit that was filed was the agreed
statement of fact. I can confirm Your Honour that
is the case for the Crown. There's no further
Crown evidence so we close our case.

THE COURT: Thank you.

25 MR. FAHMY: Good morning, Your....

THE COURT: Defence, are you calling any evidence?

MR. FAHMY: Yes, we will be calling evidence.

THE COURT: All right.

MR. FAHMY: And just before we do that, my friend
30 and I would like to address an evidentiary issue
with Your Honour and we respectfully ask that this
be done in camera because it contains some very

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5 sensitive, well, both of us are asking for that
because it contains discussions and perhaps even
showing you a video that contains some
very, we want to protect the privacy of another
individual, Your Honour.

THE COURT: All right. Is that....

MR. SOSA: That's agreed, thank you.

THE COURT: And we're going to do this at the
outset?

10 MR. SOSA: Yes, please, Your Honour.

THE COURT: Right now?

MR. SOSA: If we can do that right now.

THE COURT: All right, we'll go in camera then for
that based on the joint request by both defence
15 and the Crown.

CLERK REGISTRAR: Thank you, Your Honour. I'll
just direct the people that are asked to leave the
courtroom at this time. Thank you.

20 I N C A M E R A

THE COURT: Are we on Zoom?

CLERK REGISTRAR: Your Honour, there's nobody on
here. Would you like me to log off?

25 THE COURT: Yes, please.

CLERK REGISTRAR: Thank you.

MR. FAHMY: Okay, my computer is freezing, Your
Honour, I apologize, just a moment.

THE COURT: While you're doing that, let's just
30 talk, let's have a quick discussion too about our
plan. So I understand that we're starting today
and we have Wednesday, part of Thursday, I don't

know whether you know about that, but I only have like half of Thursday and then Friday.

MR. SOSA: We were only advised about today's date, tomorrow and Friday.

THE COURT: Oh, Friday. Okay, good.

MR. FAHMY: Yes.

THE COURT: All right. So then, yes, so Thursday was out then completely?

MR. SOSA: Yes.

MR. FAHMY: Yes, that was....

THE COURT: Okay. That's fine. So they took that into account rather than doing a half day. Perfect.

MR. FAHMY: And I could - go ahead.

MR. SOSA: So I guess, Your Honour, I mean, I know this was raised by my friend about some month ago or so. We didn't really discuss much about it until this morning when it was raised again. Essentially, there's a piece of video evidence that Mr. Fahmy wants to rely on. I'm opposed. It will require a ruling from Your Honour. The Crown's position in a nutshell is that it is oath helping, it's a prior consistent statement and its only purpose would be to bolster the credibility of Mr. Densmore. I understand Mr. Fahmy has a different position, but just in a nutshell, that is the Crown's position. So we do object to that evidence going in.

But Your Honour, again, this is something that really wasn't raised. And I take the position that this does require a ruling from Your Honour.

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And if further submissions are required or any case law, then I would require a brief recess to do so.

THE COURT: Okay. You ready to go?

MR. FAHMY: No, I just wanted to kind of...

THE COURT: Okay.

MR. FAHMY: ...make some submissions, Your Honour, about that.

THE COURT: Sure.

MR. FAHMY: So - and the reason why we're in camera. So, obviously, the evidence is, so far, that Mr. Densmore reached for his phone in order to capture the complaint while they were engaged in oral sex. Her evidence was that she said, what are you doing? He said, I'm filming. She says, put it away. He says, sure, no problem. Does that, whatever. Mr. Densmore's anticipated evidence is that he had tried to tell her, well, it's just to kind of get a consent video. She says, I don't want to be on video. So no problem and puts it away.

Now that opens up the door to my friend then to even - well, first to cross-examine him on that, right? You know, why would you do that, this and that, and you know. And second, even if, without cross examining, you know, it opens up the door to my friend to make like a submission that perhaps along the lines of like, you know, he's trying to do something further criminal or whatever, voyeurism, whatever it is, and that that's a kind of a bad act.

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5 I know there wasn't a distributable conduct application, but it's within the confines of the allegations itself. Like, it's within the confines of what was going on between the two of them. The issue is this, is that my client publicly in October of 2019, in a YouTube video is....

10 THE COURT: When is the offence date?

MR. FAHMY: August of 2020, so prior.

THE COURT: 2019, okay.

15 MR. FAHMY: Yes. He's advising the public about, you know, you know, like these like hookups, whatever at SoCo or sorry, HoCo, like the homecomings and whatever the partying, and whatever, you know, make sure you get consent, make sure you're not too drunk and then also make sure you get a consent video. So he's already warning the public about that. And then in March
20 of, and actually there's a woman who he had had a private video with, got her consent on that, and then she is also in the YouTube video with his - with her permission, obviously. Like, there's no nudity or anything like that. It's just she's
25 saying, hey, you know, whatever. And he's kind of using - because she wanted to be in the video for that part of it, and he let her and it's there in that October 2019 video.

30 And then in March of 2020, we've got a video of, you know, a different lady. And what the video will depict is her and my client are both naked.

5 He's lying on the bed. She's kind of sitting on
her knees directly in front of him, and then, you
know, she's saying, okay, like, what do you want
me to say? Whatever. He's like, like, you know,
just consent, whatever. Like, they have a brief
conversation about - she's like, yeah, I consent,
whatever, and something along the lines of like
before he could even like continue or whatever,
you know, she continues to engage in oral sex. So
10 the oral sex had happened. It stopped while he's
filming, and then she continued on, which is kind
of bang on to what is happening in our case.

15 I just don't want it - and it's not my friend's
position is that it's a prior consistent
statement, which I understand where he might want
to say that, but that's not what this is. This is
to alleviate the idea that this is like a one off
thing. This isn't something that my client has
promoted in the past. And in fact, before this
20 incident, months before this incident, there's
like the exact same situation where he was trying
to do this to kind of protect himself, which
is....

25 THE COURT: Can this not be done, absent this, by
way of a further agreed statement of fact, like
just to say, look, it exists. The purpose of it
is up to the trial judge to decide. But I mean,
as a fact, in the universe, these things exist.
30 That in advance of the occurrence that led to
this, where it has its own factual matrix to
decide consent, not consent, mistaken belief as to

5 consent, wherever we're going with it, that's,
that's over here. But this exists, that he has
made a video promoting consent videos, whether or
not he followed that is a completely different
story, whether that is what occurred there, or
whether or not even the timing even makes sense to
say after the evidence, again, hearing the
evidence of like a series of, you know, sexual
acts, now's the time to do a - anyways. But I
10 mean, that's open to be argued. But just the fact
that there was, that he has made a video promoting
to his followers, get consent on video, and that,
in fact, he did, there is one out in the universe
where he does practice this technique, and just
15 leave it at that as opposed to introducing that in
evidence?

MR. SOSA: Well, Your Honour, I had suggested to
Mr. Fahmy something close to what you've just
described. The practice that he has in place,
whether it applies or whether it's relevant for
20 our purposes, that's fine, that's one issue. I
don't see the need to play the video, to in some
way seal it and mark it as an exhibit, because
that's the way it was presented to me to....

25 THE COURT: Yes - no, I'm not too keen on that. I
mean, because I think that's the purpose of the
defence wanting to do it, to say, look, we want to
put it in front of the court that in October, the
year prior, he was promoting this. In March,
30 prior to this, he actually practiced that
technique. Full stop, without saying, because
again, it's like past conduct, that - who cares?

5 It's whether or not it sways the day, whether or not, if the anticipated evidence is, well, as per the agreed statement of facts, this is what I believe, I believe, you know, X, Y, and Z should happen and, in fact, I tried to do it at that time, and it's subject to cross-examination.

10 MR. SOSA: So, Your Honour, my only - well, what I should say is, my position is, I have not seen either of those videos that have been referred to. With respect to the open source consent video, once I observe that, I don't see any issue agreeing that it exists.

THE COURT: Mm-hmm.

15 MR. SOSA: With respect to the second video, my position would be that it's just as simple as him taking the stand and testifying that he's done it in the past. I don't believe there needs to be an agreed statement of fact. It's simply that he's done this in the past, and then if he wants to say when he did it, that would cover it.

20 THE COURT: Other than - other than for the Crown having this full disclosure. So let's say this stuff ended up in your hands as part of this whole investigation by police. You would have had it, you would have noted it, and you would have said that this exists, right? Just because it either exists or doesn't exist, question one. Relevance is question number two, and that can be...

25 MR. FAHMY: Argued.

30 THE COURT: Argued subsequently to say, well, yeah, listen. Nobody disputes the fact that, you know, he's said that in the past and maybe done it

5 in the past. But it's kind of like saying, I
adhere to the speed laws. I know 100 kilometers
means 100 kilometers an hour. And, yeah, and I
tell people, follow the speed limit. And, you
know, do you always follow the speed limit? No.
You know, that kind of argument. But maybe the
way around here, just so that we can, you know,
navigate through this, is why don't we take - how
long does it take to show this video?

10 MR. FAHMY: Oh, it's like four....

THE COURT: I don't want to see it.

MR. FAHMY: No.

15 THE COURT: You guys can look at it. I come back
in, what, 10 minutes? We stand down for 10
minutes. You take a look at it. You then come -
you decide and you say, this is what the Crown's
position is, whether or not we have to argue it
fully or not. You may very well say, yeah, open
source, no problem. Second one, yeah, I'm
20 persuaded it's okay just to mention, to say that,
you know, again, in March or whatever, this -
he...

MR. SOSA: Right.

25 THE COURT: ...practiced what he was preaching and
with the idea that the relevance of that
particular information or evidence is going to be
determined by me, you know, whether or not that
means anything or not.

MR. FAHMY: Exactly.

30 MR. SOSA: So then, with that, Your Honour, I
think 10 minutes might be a little tight. Could
we get...

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THE COURT: Okay.

MR. SOSA: Do you want to come back at 11?
Because if you look at it and you decide it's
okay, then we could do - you could then give a
statement of fact. Good? Or do you need longer?

MR. SOSA: I think 11 is enough time, Your Honour.
That's what you suggested, sorry, right?

THE COURT: Yeah, yeah, no, 11. I'm flexible. Do
you want, do you need more - I know it's tough.

MR. SOSA: I really need to....

THE COURT: Eleven-fifteen?

MR. SOSA: I need to see it and consider the
Crown's position. That's why it's difficult for
me to - but I think 11 is enough.

THE COURT: You sure? Because I don't want - this
is the 7th floor, so I'm going back up and down.
I'm being a little selfish.

MR. FAHMY: How about this....

THE COURT: Eleven-fifteen, or why don't you
contact...

MR. SOSA: Yes.

THE COURT: ...the trial coordinator when you're
ready?

MR. SOSA: Sure.

THE COURT: So we're - well, this is considered
the continuation of our in camera session right
now. I'll be recalled when you've had an
opportunity to discuss how we're navigating.
Good?

MR. SOSA: Yes, thank you.

MR. FAHMY: Thank you.

... COURT IS STOOD DOWN.

... COURT RECALLED.

5 MR. FAHMY: Yes, thank you, Your Honour, first for
that time. Unfortunately, my friend takes the
position that the private video, along with the
YouTube videos, are not relevant, and therefore,
he can't agree to an agree statement of fact that
I emailed to him, which just outlines the basic
existence of these facts. However, I think the
10 issue goes a bit deeper than that, in that if I
were to even ask my client about this while he's
on the stand, my friend's going to object to say
that it's not relevant. So I take the position
that not only is it relevant, but it's admissible.
My friend takes the position that because it's not
15 relevant, it's not admissible. I take a different
view. My view is that there is probative value in
it, it's relevant, and it's admissible, but that
the weight of its relevance is something that
could be argued later on.

20 What I do suggest is, you know, I've talked to my
- and my friend gave me a case, you know, Supreme
Court of Canada decision. I don't think it's on
point with respect to that, because that's a 276
25 on its constitutionality. So instead of kind of
holding the matter down, us trying to make further
submissions or arguments about that, I would like
to get started with my client's evidence. I guess
we can - perhaps the way the questioning might
30 come out in that my friend won't object if he does
object, what I'm going to suggest is that we kind
of hold off on this until tomorrow, perhaps.

5 I have two thoughts, either to ask you to hold
this down and we come back at two to make the
arguments, and then we've kind of wasted the day
on this. Or we can get started, take the rest of
the, like, you know, after court's done, to try to
come up with some arguments, come back on
Wednesday morning to continue with my client's
evidence. I'm in your Honour's hands. I'm just
10 trying to think a couple steps ahead.

THE COURT: Yes. No, no, I appreciate that.

MR. SOSA: Your Honour, the position is simple
from the Crown's view. It's not relevant. Ms.

15 [REDACTED] took the stand, was asked, did you
agree to this consent video? She said no. There
is no consent video.

THE COURT: Well....

MR. SOSA: What is the relevance of prior consent
videos?

20 THE COURT: Well, no, it's - as I understood it,
it was, that's the suggestion being posed, the
Browne v. Dunn kind of suggestion, is to say, was
this a, she says no to that, his evidence, I
anticipate now is going to be, yeah, the reason
25 why I did that was a consent video. Now it pits
the two versions against the other. Not that
that's the decisive analysis, but it's, now we
have, hold on, she said absolutely not, he says it
did, that's why I did this particular thing, and
30 again, I do this all the time, and I preach it.

Okay, well, does somebody's path, as I said, like,

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5 I mean, that's when the argument comes up, the
evidence is there to say, yeah, okay, that's what
his practice is, and he didn't do it here. I say
that he is not a credible witness, she's a
credible witness, this never even came up, this is
sort of like *ex post facto* rationalizing of
something that occurred. And, you know, just
because that's your normal practice doesn't mean
10 that that occurred on that particular day, and
there's no evidence to support that, or the
evidence supports that it didn't occur, and
therefore, it has to be disregarded.

15 And in fact, that, at that point, can be used as a
determination to say that this person shouldn't be
believed on that. Like, he's making this stuff
up, as opposed to anything else. So, again, I'm
kind of urging counsel to consider a way of stick
handling this, because like my - if we can't, my
20 preference is that we do these things
incrementally. It makes no sense at all to me
that at some point, we don't know when it's going
to come up, and it could come up quite
spontaneously, all of a sudden, you're up, and
25 we're doing this, and it's going to be okay, time
out, because it really doesn't make sense to sort
of bypass that issue, and then finish, I guess,
the exam in-chief, almost, until we have a ruling
on this, and then come back and revisit it, at
30 which then it's a second kick at the can. Then
you're jumping up and going, well, Your Honour,
you already said this, like, why are we doing

this? I think that we have to do it step by step.

5 So, if we cannot come to some kind of consensual agreement about its use, right, and oftentimes we'll do this in pretrial applications anyways, to say, well, yeah, you could do that, but this is as far as it goes. The purpose of it is just to say that it happened, I'm not saying it happened over here. That it happened, not once, but twice.

10 Once to the general public in a YouTube thing, if that's what it was, and once in the circumstances of a private encounter with somebody. And that's it, that this happened. Not to say it happened on this day, leaving it completely open for fruitful cross-examination, and ultimately argument about, you know, what weight, if anything, should be put on that evidence, just saying.

15 MR. SOSA: No, I hear Your Honour's point. The challenge, however, is whether it's admissible. It has to be relevant to be admissible. If I agree, if the Crown agrees, yes, that becomes part of the court record.

20 THE COURT: Right.

MR. SOSA: I am agreeing that it can be considered as evidence.

25 THE COURT: Right.

MR. SOSA: So we're opposed because it's not relevant, Your Honour. The fact that he had a practice in place is not what I'm objecting to. What I'm objecting to is the admissibility of those videos. Those videos....

30 THE COURT: On the basis of relevance only.

5 MR. SOSA: Right. And they do not — they do not
advance the truth-seeking function of this court,
for all the reasons that you've already
identified. And, Your Honour, it's no different
than if Mr. Densmore called those ladies here in
person and said, well, I consented. How does that
assist? It doesn't assist. The fact he had a
practice, fine.

10 THE COURT: Okay.

MR. SOSA: The videos, irrelevant.

THE COURT: All right.

15 MR. FAHMY: Again, Your Honour, I mean, it's
entirely relevant because she said that he did not
ask her about a consent video, which is what my
client's evidence is going to be. And the fact
that he has preached about it before, that this is
something that he has done privately with others,
and this is before her. We're trying — I mean,
I'm not here to say....

20 THE COURT: Okay, so let me just stop you there.
Let's snowball off of what you're saying.

MR. FAHMY: Yes.

25 THE COURT: If that came to pass and we're not
even talking about a agreed statement of fact.
You're putting this to him, you're asking him, you
know, what occurred at this particular point, and
he said, I asked to make a consent video.

MR. FAHMY: Mm-hmm.

30 THE COURT: Okay. Great. Then you ask the next
question, which is, why would you do something
like that?

MR. FAHMY: Mm-hmm.

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5 THE COURT: I guess we're going to be in the same
scenario where you jump up and say, relevance,
right? So either way you slice it, we're going to
come down to an argument about the relevance of
that bit of information. If that's the case, I
can see that we're at an impasse, and I'm going to
say, let us then, I'll give you time, but we'll
come back in the afternoon, and I'll hear
10 submissions on the relevance of that. Now, if
there's anything else lurking, let's do all of
that at the same time.

MR. FAHMY: Sure. But again, Your Honour, all I
wanted to say is that my friend's argument really
isn't that it's not relevant. My....

15 THE COURT: That's exactly what he just said.

MR. FAHMY: I understand what he's saying, but
what he's actually saying isn't that it's not
relevant. What he's saying is that it's not
relevant with respect to whether or not he tried
20 to do a consent video at that particular point in
time. But that's an argument for weight, not
relevance. Because if it wasn't relevant, then
the argument that the Crown would be - and again,
the Crown is trying to say that it doesn't matter
25 that he did that before. But our argument is that
it does matter, and it also matters that he's
telling the public to do that, right? Because why
else would he be bringing out his phone at that
particular moment in time? It's relevant to show
30 that that's why he did it.

THE COURT: Well, that's his - that's his
explanation of why he does it.

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MR. FAHMY: Exactly. And he's

THE COURT: I'm sure that there's a - I got a - I got a different sense from that witness why that was happening.

MR. FAHMY: I got that, and that's why I'm here to, you know, that's part of his evidence, and that's something that we need to be able to tell Your Honour well, no, no.

THE COURT: All right. How long do you guys need then to argue the point?

MR. SOSA: Your Honour, my submissions are - I mean, I pretty much already....

THE COURT: You ready to do it now?

MR. SOSA: Well, I've already shared them with you, Your Honour. I understand my friend might want to see if there's something more that he can provide the court. If I could, since my friend referenced it, I did provide him with a case.

It's a seminal Superior Court case, *Darrach* from 2000, Your Honour.

MR. FAHMY: *Darrach*.

THE COURT: Superior Court or Supreme Court?

MR. SOSA: Supreme Court.

THE COURT: Supreme Court.

MR. SOSA: And it's just simply to point out - and I've sidebarred it for Your Honour, at paragraph 24.

THE COURT: Okay, hold on, let me just - para. 24 of *Darrach*.

MR. SOSA: And while this is one of the cases that first did a thorough review of 276, Your Honour, at the second half of paragraph 24, specifically

the second half of that paragraph:

5 Nor is the accused entitled to have procedures
crafted that take only his interests into
account. Still less is he entitled to
procedures that would distort the truth-
seeking function of a trial by permitting
irrelevant and prejudicial material at trial.

10 Your Honour, then I ask that you turn to page -
sorry, paragraph 37.

THE COURT: Paragraph 37.

15 MR. SOSA: And the first line, "An accused has
never had a right to adduce irrelevant evidence".
So while that is in the context, Your Honour, of
276, in this case it's been applied to cases in
general. We can't have evidence....

20 THE COURT: So this is a 276 case, but you're
talking - this is more about the law of evidence,
relevance,

MR. SOSA: In general.

THE COURT: Lack of relevance.

25 MR. SOSA: Right. It applies to all cases dealing
with evidence. You can't have irrelevant evidence,
Your Honour.

THE COURT: Okay.

MR. SOSA: So that's the Crown's position, really,
I mean. I mean....

MR. FAHMY: I....

30 THE COURT: Are we doing submissions? Is that
what we're doing? We're arguing it now? Do you
need some time or what do you want?

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5 MR. FAHMY: Well, I would - listen, Your Honour,
if - I mean, if this is a situation where the
court is like, I don't need to hear it from
defence, it's - you know, there is some relevance,
let's move forward, I'm happy to do that. If
you're not in a position to do that, Your Honour,
then, yeah, I'm going to need some time because
I'm roping in Section 162 of the *Criminal Code*
that this private video serves [indiscernible].
10 Again, I don't - I don't - just a brief moment.
Okay.

15 As I understand it, right, because I don't want to
show the video. You know, decency, whatever,
let's - I don't want to show that, right? I want
to avoid that. My understanding is that if Your
Honour rules that it is relevant, then we can then
proceed by way of an agreed statement of fact.
So, having said that, if this is a situation where
20 the court requires submissions from the defence,
I'm happy to do that, but I'm going to need time.
But if you're ready to - if you don't - if this is
a situation where it's like I don't need to hear
from the defence, I'm ready to say that it's
25 relevant, then I'm happy to do that as well.

THE COURT: Well, this is a situation where I've
heard, I think, probably as much as I'm probably
going to hear from the Crown on the issue of
relevance. They're saying, look, this was - their
30 position was akin to oath-helping and at the very
best, irrelevant. So we shouldn't be doing it.
That's their position. Your - and he's provided

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me a case. So that's what I have. And so it's sort of stacked on his side because I have material from him. I'm happy to give you an opportunity to, you know, and not too long of an opportunity, but you come up with something and then you make your submission on the balance. And then I would like to make a decision quickly on it so that we can move on.

MR. FAHMY: Certainly, Your Honour. Can I - well, I used all my time to put the agreed of fact together and all that. So it's 11:41 or 45, Your Honour. If I can also have, you know, an hour and 15 minutes and then maybe we come back for earlier than usual for lunch at 2 o'clock?

THE COURT: Okay. So we take our break now. We come back at 2 o'clock for you to make your argument, and then...

MR. FAHMY: Yeah.

THE COURT: ...I'll hear it. Is that okay with the Crown?

MR. SOSA: Yes, that's okay.

THE COURT: You're pretty well, this is it, right?

MR. SOSA: If something comes up, but I think that's it, Your Honour.

THE COURT: Okay, so good. Well, no, I mean if there's something - because you're obviously preparing.

MR. FAHMY: Sure.

THE COURT: I don't anticipating there being much more, my position....

THE COURT: No, this is an argument about relevance. So you - we'll come back at 2 o'clock

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to hear submissions from the defence on this issue of relevance, and then I make a determination, and then we can get started.

MR. SOSA: Yes.

MR. FAHMY: Thank you, Your Honour.

THE COURT: Thank you.

R E C E S S

U P O N R E S U M I N G:

THE COURT: All right, thank you. I've received your material. So I've received it, I've read it, so if you wanted to make submissions to supplement it or not, it's up to you.

MR. FAHMY: I'll just be very brief. That was actually going to be the first thing I was going to ask the Court, Your Honour, to make sure that you've gotten it.

SUBMISSIONS BY MR. FAHMY:

So, again, you'll see from the excerpts, there's links to the cases, to the full cases, if Your Honour had need of it. But, you know, essentially this is evidence 101. So, relevance is not a legal concept. It's a test of a matter of logic and human experience, whether the proposition is likely or less likely to be true. This case is about credibility. This case is about credibility. This isn't oath helping, like my friend had alluded to earlier. Oath helping is

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when we bring somebody to give evidence to say
that this person is more truthful, full stop.
This is not oath helping.

5 THE COURT: Well, I think that the suggestion was,
look, he's going to say, anticipated in his
evidence, that I wanted to do X. Here's a video,
or here's an agreed statement of fact, that in the
past I have said, I want X. And here's me saying
10 to somebody, I want X. And that's where I think
it's either prior consistent statement type
analogy, loosely, or there's oath helping, or
simply going to relevance.

MR. FAHMY: Yes. So, let's unbox that for a
moment, Your Honour. I'm going to start with
15 relevance first, because the relevance is there in
terms of this key piece of evidence that we're
presenting is to suggest that the likelihood that
Mr. Densmore had used his phone at that moment in
time was for that purpose. It's to help that
20 fact. It's not about his credibility. Sorry. It
is about his credibility, which is a material
issue in this trial. But it is not to suggest
that he is more, as a person, as a character, more
truthful than he would have been. It's just
25 helping the fact that he had done it in the past,
and that that fact informs the reason why he had
his phone at that moment, and informs what he had
said to her at the same - it's all part and
parcel. It's very logically connected, fact A,
30 fact B, fact C, and you can run that train in
terms of relevancy logically. It doesn't have to
be directly. And, again, the threshold is bar

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minimum.

5 And there's a wider latitude given to defence
evidence, as the case law very clearly states. Of
course I'm allowed to introduce evidence to help
my client's credibility. Of course I can
introduce any fact that helps his credibility. I
can introduce a fact if he said something had
10 happened at a different time of day, I can bring
somebody in or bring other evidence to show that
it happened on that, he was - that it happened on
that day or at that time. Of course we are
allowed to introduce evidence to show that my
client's version of events is more credible.
15 Absolutely. That's the bedrock of any case, Your
Honour, is to - especially when it's a credibility
contest, is to show other facts, other things to
show.

20 Like, for example, when I'm cross-examining the
complainant, there are several points in her
evidence that may not have to do with the exact
moment in time when the sexual assault allegation
occurred, but it had to do with her credibility in
25 terms of facts that were put to her, propositions
that were put to her that could tend to show that
she's either not credible or not reliable. That's
the basis of any trial. This is not oath-helping.
I just cited - I wasn't sure if I should have gone
30 into that one, Your Honour, but with respect to
that....

... UNRELATED MATTER SPOKEN TO - NOT REQUIRED.

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5 MR. FAHMY: So the rule on oath-helping is - or
against oath-helping, prohibits the admission of
evidence adduced solely for the purpose of proving
that a witness is truthful, full stop. The rule
applies to evidence that would tend to prove the
truthfulness of the witness rather than the truth
of the witness's statements. That's the
difference. And....

10 THE COURT: I didn't - I didn't - when I said
that, I was simply repeating what your friend
said.

MR. FAHMY: Yes.

THE COURT: I don't really think that this is what
this turns on.

15 MR. FAHMY: Okay. I really thought it was just
about relevance, and again, whatever's relevant is
admissible. Materiality, the relationship between
the two, is very thin. It's weight. This is
about weight. This is about what to do with that
20 evidence at the end of the day. There actually is
no minimum probative value that is required for
evidence to be irrelevant. Is it material? Yes,
it's material because the issue is credibility.
The issue is what my client is going to say
25 happened. And that fact, in the past, supports
the fact that he would have done so.

30 In the absence of it, it's in a vacuum. It's in a
cloud. It has no rational connection to his
behaviour, why he would do something like that. It
just - it's a - it's an important element with
respect to why he would have done something like

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5 that. And to prove that what he said to her was,
this is for consent, she says, no, okay, no
problem, puts the phone away. Because her, and it
was put to her, by my client's version of the
interaction, and she denied it. My client's going
take the stand to do that. So it helps to prove,
not the truth, not his truthfulness, but the
truthfulness of his statements, Your Honour.

10 THE COURT: Anything in reply?

15 MR. SOSA: Just brief, Your Honour. Again,
relevance is founded on what the live issue is for
this court to decide. As Mr. Fahmy's already
noted, these are general principles that are
applied in every trial. The fact about him using
a phone to obtain consent, Your Honour, can be
explored if he wants to say, I have this practice.
Again, it's what value do these videos provide to
this court. Specifically, when we have one that
is explicit in nature, and that opens the door to
20 another wealth of potential issues, Your Honour.
So the relevancy is what's the live issue that
this court needs to determine, not whether or not
these videos, actually, based on what I heard from
Mr. Fahmy, his words, to prove that he would have
25 been using it to obtain her consent.

30 So, it - again, he's trying to bring these in to
answer what Your Honour will ultimately determine,
which is consent, but based on an irrelevant,
around the way - in an around-the-way fashion.
And the reason I say that is because I hearken
back to my submission as it being akin to oath-

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5 helping. It's the same thing, but it's being done
by video in this case, that if we were to have
those witnesses here, *viva voce*, saying, oh yeah,
he's provided me with this same scenario, and I
consented. So, yeah, I know he does it. How is
that relevant? How is that admissible? It's
putting that same type of evidence in, and it's
not relevant, and it shouldn't be admitted.

10 THE COURT: All right, thank you. No sur-
rebuttal, that's okay.

R U L I N G

KRAWCHENKO J. (Orally):

Nothing which is not rationally relevant to issues in dispute is admissible. If evidence does not relate to an issue in dispute, then the evidence is inadmissible. The issue in dispute in this trial is that of consent of sexual activity on the date and time at issue.

The accused seeks to adduce evidence of past teachings and an act on this issue on a video as evidence of consent. That is essentially what is being proposed, is the teachings, in a general video, and then an actual specific example of what had occurred. This trial does not relate to the complainant's views on consent, or methodology of obtaining same on previous sexual interactions with others, where consent was elicited and recorded. His past practices and experiences are simply not relevant, nor material, and are therefore inadmissible.

Now, I am mindful of the fact that this is a request by the accused, and the court must be cautious before excluding evidence that may raise a doubt as to the accused's guilt. Even so, and even on a more relaxed analysis, the evidence proposed does not go to the issue in dispute.

Therefore, I find it is not relevant, and

therefore not admissible.

5 Additionally, the rules of evidence preclude an
 accused from eliciting previous self-serving
 statements. That is excluded under hearsay rules,
 but for all those reasons, we are not going to go
 there. It is permissible, obviously, in
10 examination, to deal with this and to get to this
 issue that Mr. Fahmy has pointed out, about the
 credibility of the complainant versus the accused,
 to say, this is what I did. She did not say that.
 The accused saying, that is what I know to be the
 way to do it, and that is why I tried to do it. I
 think that that is fair game.

15 What we are not going to go is backwards to say,
 and as evidence of that to support this, I have
 done it on many other occasions, and there is a
 handful of them, and I have examples. It is a
20 balance. It is there. It is fair to bring it up.

 That is my Ruling on that.

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THE COURT: So are we ready then to go back on the record and start the evidence?

MR. FAHMY: Well, now that I have Your Honour's Ruling, I mean, I just don't want this to kind of delve into further issues, but I don't think - so I just want to understand, because my friend's objection was just the fact of introducing the actual videos into the evidence, not the fact that he had done it in the past, because I'm going to be eliciting evidence from my client, from - he got that advice from college athletes, and that's why he started to do that, and whatever.

I don't think that my understanding of my friend's objection was just the actual videos themselves, not the fact, I mean, his submission, he can say that he did all that stuff, it's just that we can't show the video because it's not relevant, is that correct?

THE COURT: Well, that's how I'm ruling right now.

MR. FAHMY: Okay.

THE COURT: I mean, when he's giving his version of the story, whatever his evidence is, then short of maybe, and I don't know but - what he's going to say or how it's going to be approached, but if, like I said, it's fair game to say what happened, like how did you approach this evening and whatever, and if that is what the anticipated evidence is, as we've discussed today, which is, yeah, you know what, I'm very attuned to this, and this is what I did, because I know that this is a big thing, and somebody told me once before, and I

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think it's a great idea. I think that that's fair game to have somebody say that in testimony.

MR. SOSA: I don't object, Your Honour.

THE COURT: Yes.

MR. SOSA: Like you've noted, it informed why decisions were made at that moment.

THE COURT: At that moment.

MR. SOSA: Right.

THE COURT: What we're not going to go in is to say, oh yeah, and by the way, here's a handful of examples of it that I happen to have recorded, and they're on YouTube or whatever, that's my ruling as to those things, they're not relevant, but try to give some guidance so we don't have these little issues as we go along. Does that explain the Ruling a little bit better?

MR. FAHMY: Yes. Again, I just - I understood it as their existence is not an issue that Mr. Densmore can't give evidence on, it's just admitting them as...

THE COURT: But we're not even...

MR. FAHMY: ...like exhibits or anything like that.

THE COURT: ...going to talk about that. We're not even going to talk about their existence, because that then is through the back door, what I'm saying he can't do through the front door. We're not talking about - he can talk about his belief in what he has to do and what he did that day. What informed that belief...

MR. FAHMY: Mm-hmm.

THE COURT: ...but what is not admissible, whether

5 in video form or through the testimony, is to say,
oh, I have these examples, this has been my
methodology, right? That's the part that has no
relevance to this. What's relevant is that I have
a thought process, and this is what I did this
day, and it's based on really good reasons,
because, you know, I've been - I've been
sensitized, I'm educated to this. That's okay.

MR. FAHMY: Okay.

10 THE COURT: But what happened on that day, that's
what's important.

MR. FAHMY: I - I don't disagree with that, Your
Honour, I think that's why - yes.

THE COURT: Okay?

15 MR. FAHMY: Okay, I have Your Honour's Ruling.

THE COURT: All right. And we'll take it from
there.

MR. SOSA: Yes. Thank you.

THE COURT: We're ready to go?

20 MR. FAHMY: Can I just have a couple minutes with
my client before he takes his stand, Your Honour?

THE COURT: Okay, I'll give you....

MR. FAHMY: Ten minutes?

25 THE COURT: Yeah, all right, ten minutes, and then
that will give an opportunity then to say, to tell
whoever the public is that we're starting up in
ten minutes, we're finished in camera. Good?

MR. FAHMY: Thank you.

THE COURT: All right, ten minutes.

30 ... COURT STOOD DOWN.

... COURT RESUMED.

... EVIDENCE PREVIOUSLY TRANSCRIBED.

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