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Three Views on Veils in the Courtroom: *R. v. N.S.*[1] at the Supreme Court of Canada

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NS is a Muslim woman who wears a niqab, a veil that covers the lower half of her face, so that only her eyes are visible. In 2007, she accused her uncle and her cousin[2] of sexually assaulting her between 1982 and 1987, when she was a child. At the preliminary hearing, the accused sought an order requiring NS to remove her niqab when testifying. After a *voir dire*, at which NS wore her niqab, the preliminary hearing judge concluded that her religious belief was "not that strong" and ordered her to remove the niqab while testifying. The preliminary hearing was adjourned. NS applied to have the order quashed and to be permitted to wear her veil while testifying at the prelim. The case went to the Superior Court,[3] the Court of Appeal[4] and the Supreme Court of Canada.

The majority decision: contextual balancing of competing rights

The majority of the Supreme Court (McLachlin C.J., Deschamps, Fish and Cromwell JJ.) rejected a clear rule that would always permit a witness to wear a niqab in court or always prohibit her from wearing one. They favoured contextual balancing of competing *Charter* rights: freedom of religion under s. 2(*a*) for the complainant and fair trial rights under ss. 7 and 11(*d*), including the right to make full answer and defence, for the accused.

Trial fairness would be at risk if the face covering impeded defence counsel's cross-examination or the trial judge's or jury's assessment of credibility. Requiring the witness to remove the niqab could interfere with her sincerely held religious beliefs. Women might be deterred from reporting offences against them, including sexual assault.

The majority acknowledged that being able to see a witness's face is not the only, and perhaps not the most important, factor in cross-examination or credibility assessment. But there was no expert testimony on the record to support arguments about the weaknesses of demeanour evidence, and "its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence).[5]

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[1] 2012 SCC 72.
Online at http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/12779/index.do
[2] The second accused was variously described as a cousin or a family friend.
[3] 2009 CanLII 21203.
[4] 2010 ONCA 670.
[5] Para. 27.

The Chief Justice, writing for the majority, proposed

...that courts should deal with the conflict between rights in cases such as this by finding a just and appropriate balance between freedom of religion on the one hand and fair trial rights on the other. The result is that where a niqab is worn because of a sincerely held religious belief, a judge should order it removed if the witness wearing the niqab poses a serious risk to trial fairness, there is no way to accommodate both rights, and the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so.[6]

The majority sent the case back to the preliminary inquiry judge to be decided in accordance with their reasons.

The concurrence: An open and neutral justice system

Justices LeBel and Rothstein concurred in the result, but would propose a clear rule that a niqab may not be worn at any stage of the trial process. For them, besides the clash between a religious right and the right to make full answer and defence, the case "engages basic values of the Canadian criminal justice system". They ask:

Is the wearing of the niqab compatible not only with the rights of the accused, but also with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada?[7]

Their answer is that the wearing of the niqab unduly constrains the defence and is not compatible with an open, independent and religiously neutral justice system.

The dissent: An unacceptable choice

Justice Abella, in dissent, would have set a clear rule that a witness whose sincere religious belief requires her to wear a niqab in public must be allowed to wear it while testifying in court. She would make an exception only where the witness's face is directly relevant to the case, such as where the witness's identity is in issue.

A witness who cannot testify while wearing her niqab is forced to choose between her religious beliefs and her ability to participate in the justice system. She may resist being a witness in another person's trial. Justice Abella points out — she is the only one on the Court who does so — that an accused will be unable to testify in her own defence if forced to remove her niqab against her sincere religious beliefs.[8]

Abella J. grants that it is easier to assess a witness's demeanour if the whole "demeanour package" — face, body language, voice, etc. — is available for scrutiny. Yet we allow witnesses to testify through an interpreter; behind a screen or by closed circuit television; by a transcript of testimony taken out of court; or by telephone. The hearsay rule has exceptions

[6] Para. 46.
[7] Para. 60.
[8] Paras. 94, 108.

Medical or physical problems may interfere with the assessment of demeanor, but do not prevent the witness from testifying. And

> ...while the ability to assess a witness' demeanour is an important component of trial fairness, many courts have noted its limitations for drawing accurate inferences about credibility.[9]

A partial interference with one part of an imprecise measuring tool of credibility is outweighed by the harmful effects of requiring a witness to remove her niqab.

Factums

Some of the factums filed at the Supreme Court are available online:

Appellant N.S., Respondent A.G. of Ontario and Respondent M-D. S.:
http://www.scc-csc.gc.ca/case-dossier/cms-sgd/fac-mem-eng.aspx?cas=33989

LEAF (Women's Legal Education and Action Fund:
http://leaf.ca/cases/r-v-n-s-scc/

Canadian Civil Liberties Association:
http://ccla.org/wordpress/wp-content/uploads/2011/12/Appeal-Factum-FINAL.pdf

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[9] Para. 99.