Court File. No. 33989

IN THE SUPREME COURT OF CANADA

(ON APPLICATION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

N.S.

Applicant

and

HER MAJESTY THE QUEEN

Respondent

and

M---D.S

Respondent

and

M---L.S

Respondent

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MEMORANDUM OF ARGUMENT

OVERVIEW

1. N.S. is a complainant in a sexual assault case. She wears a niqab, or veil, as part of her Muslim faith. She was ordered by the preliminary inquiry judge to take off her veil when testifying. She takes issue with that order. She seeks the comfort of her religious observance during her stressful ordeal in the witness box at both preliminary inquiry and trial. She should be entitled to wear her niqab out of respect for her Charter religious freedom and equality rights, respect for her dignity and vulnerable position as a sex assault complainant, and because the veil does not impair a full assessment of her reliability.

2. N.S.'s predicament is not hers alone. It is everyone's. The heart of this case is that after decades of scientific research, all experts agree there is no clear evidence that facial

expressions are helpful in assessing credibility. And there is some evidence that facial cues may be unhelpful. Yet we still cling to the notion that the face tells the story: a notion that must yield to well founded, research based knowledge. With the scientific evidence as our guide, the problem in this case falls away. A niqab does not interfere with assessing reliability, so it is simply innocuous religious garb to be accommodated without question.

3. There are negative consequences to clinging to the out dated assumption that the face must be seen for a witness to be truly understood. The justice system suffers the disrespect of the intellectually discerning. Religious freedom is undermined by unwarranted adherence to shaky assumptions about what a face reveals. Access to justice by minority communities is impaired. Gender equality is violated because niqab wearing women face the prospect of partial disrobing as a condition of participation in the justice system. Uncompromising adherence to myths about reading faces precludes appropriate sensitivity to the unique plight of niqab wearing sexual assault complainants. And accused women who wear niqabs will be unfairly disadvantaged when they enter the witness box.

PART I

THE FACTS

4. The Respondents M---d. S. and M---l.S. are charged with sexual offences against N.S., who is an observant Muslim and wears a veil or niqab on her face. During the preliminary inquiry, before N.S. began her testimony, the defence brought an application "requesting an order … that the witness give her evidence without her face being covered".[1] The defence explained that "it is a question of making full answer and defence. It is a question of being prepared for the nature of the witness that you will meet at trial".

5. The first question to be decided was whether the preliminary inquiry judge had jurisdiction to rule on the issue raised by the defence. The Crown said "this is fundamentally a Charter issue and one that is left to be adjudicated at trial", involving a balancing of s.2(a) rights to

[1] Transcript, September 10, 2008, p.2 lines 14-17; p.8 lines 2-7

freedom of religion with s.11(d) rights to full answer and defence.[2]

6. The preliminary inquiry judge ruled as follows.[3]

> What we are talking about is the manner in which the witness is to give her evidence, which is clearly an evidentiary issue and I think I clearly, therefore, have jurisdiction.

7. After the ruling on jurisdiction, counsel moved to the question of the niqab itself. The Crown stated, "there's a concern that the complainant is entitled to notice and to retain independent legal counsel or to receive advice thereof if she so chooses. That, I don't think can be accomplished overnight."[4] The matter went over to the next day, to call other witnesses.

8. The next day the defence requested an evidentiary foundation for the niqab issue. The Crown reiterated its concerns about independent legal advice for N.S., and the judge immediately responded. The exchange is as follows.[5]

> … in view of Your Honour's ruling that this is an issue that is justiciable before Your Honour, it's the Crown position that the complainant in the circumstances would be entitled to independent legal advice and the Crown would ask for some time given these circumstances, for her to obtain that. …
>
> The concern is just about how this matter and the veil in particular implicates this individual's personal Charter rights and the Crown, not being that person's individual lawyer, it's the Crown's position that this is a situation, given that it's a relatively novel legal issue as well, that it would be most prudent for the complainant to obtain independent legal advice.
>
> **THE COURT:** Let's have the complainant in, wearing her veil, and put her in the box, and ask her what her position is.

9. After a brief recess, the Crown advised the court,

> The complainant is in attendance. I wish to make clear that it is still the Crown's strong position that she ought to be entitled to independent legal advice before testifying with respect to --- even with respect to the wearing of the veil. I have tried in the little break to see through VWAP [Victim Witness Assistance

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[2] Transcript, September 10, 2008, p.14 lines 22-32; pp. 19-20
[3] Transcript, September 10, 2008, p.21 lines 27-32
[4] Transcript, September 10, 2008, p.25 line 28- p.26 line 5
[5] Transcript, September 11, 2008, p.4 lines 3-33

> Program] if there isn't --- if she's able to get some preliminary independent legal advice, we haven't been successful at this point. I have --- certainly, I'm in your Honour's hands. I would just like to make clear for the record the Crown's strong position that she should be entitled to some independent legal advice before testifying about wearing the veil.[6]

10. Defence counsel suggested that the complainant should testify about the veil issue under oath. The judge ruled as follows.[7]

> I'm not clear what her position is and we are sort of running into the very issue we are trying to avoid if we swear her in and she is wearing her veil and the gentlemen are going to ask her questions. So I'm just trying to find some palatable way out of this. And I think as informal as possible and it's not a matter of her giving evidence, it's a matter of her telling us what her view is and if --- I'm agreeing with you. If she's adamant that there is a religious issue here, then I think she should have independent legal advice. But it's entirely possible that when she understands what your position is and the alternatives, she may very well agree, I don't know.

11. When N.S. was brought before the judge he said this to her. [8]

> So I brought you in here because we have an issue we have to somehow come to a resolution about and the issue of course is your veil. And counsel representing the accused don't feel that they can adequately represent their clients and make what's known as full answer and defence if they're questioning someone and they can't really follow her expressions, because they think that being able to follow your expressions will allow them to know what direction to take in their questioning. So they feel handicapped with your veil. On the other hand, I understand that you object to testifying without it and the decision is mine, actually, as to whether you testify with or without it. And just on a very informal basis, no one will be asking you any questions other than myself, I'd like to hear for my own ears just why you object … and how strong your objection is".

12. N.S. replied immediately, "the objection is very strong."[9]

13. In her exchange with the judge, N.S. made the following points about her very strong objection to removing the veil while testifying.[10]

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[6] Transcript, September 11, 2008, p.7 line 4 – p.8 line 6
[7] Transcript, September 11, 2008, p.10 line 10 to p.11 line 8
[8] Transcript, September 11, 2008, p.11 line 17 to p.12 line13
[9] Transcript, September 11, 2008, p.12 line 14
[10] Transcript, September 11, 2008, pp.12-14

- "It's a respect issue, one of modesty, one of --- in Islam we call honour".
- "I've had this veil on for about five years now".
- "I can look directly at defence counsel, that's not a problem".
- "the religious reason is not to show your face to men that you are able to marry".
- "It's to conceal the beauty of a woman and, you know, we are in a courtroom full of men and one of the accused is not a direct family member. The other accused is a direct family member and I, you know, I would feel a lot more comfortable if I didn't have to, you, know, reveal my face".

- When asked by the judge when she is without her veil, she said "only with family members. So people that you are not allowed to marry. So, father, brother, father in law, dads brothers, moms brothers and women, all women and children … [But] not in public, no".

14. Immediately after this exchange, the judge said, "I think the young lady should have independent legal advice … and we can argue the veil issue at the next hearing". [11]

15. The preliminary inquiry proceeded with other evidence. Later in the day, Crown counsel advised that she had been able to speak to independent legal counsel who was prepared to go on record for N.S. The issue of standing for the complainant was discussed and counsel for M---d.S., appearing to speak for both defence counsel, conceded standing. [12]

16. At the argument of the veil issue on a later date, it was agreed that N.S. has a driver's licence, and that the photo for the licence was taken by a female official, behind a screen out of view of any other person.[13]

17. The core of the judge's reasons for forcing N.S. to remove her niqab is the following.[14]

> Now, on the other side of the factors that I have heard and taken into consideration is my assessment of the strength of this religious belief held by the complainant and just how important to her, her constitutional rights and freedom

[11] Transcript, September 11, 2008, p.13 lines 22-30
[12] Transcript, September 11, 2008, p.22 line 13 to p.23 line 8; p.25 lines 23-27
[13] Ruling, October 16, 2008, p.8 lines 14-21
[14] Ruling, October 16, 2008 p.7 line 17 to p.10 line 17

of religion is.

> We have learned earlier in the hearing her basic rule and then at the 11th hour that there are exceptions to the rule. Starting with earlier in the proceedings, something that does not so much constitute an exception to the rule but it is something that was articulated by the complainant struck me at the time, and if you bear with me I would like to quote her exactly, so when I first placed Miss [S.] in the witness box unsworn and inquired into the strength of her religious belief she said and I quote, "it has to do with respect to honour and modesty. It is very strong", and then she wound up saying that should she be permitted to wear her veil she would be "a lot more comfortable", but then at the 11th hour we learned about one exception, in that she has a driver's licence with her unveiled facial expression upon it, but she took comfort in the fact that, although it was taken in an open office, there was a screen between her and potential male onlookers, and it was taken by a female photographer …
>
> My problem with that procedure satisfying Miss S. is that there is a certain specious reasoning involved. It may be one thing for a female photographer to take the picture but that driver's licence can be required to be produced by all sorts of males all the way from police officers and border guards and numerous people who simply ask for your driver's licence for purposes of identification when you produce your credit card, or whatever, and so it did not satisfy me as the trier of fact that it was consistent with the strength of Miss [S]'s belief to be content to have her face unveiled on a driver's licence open not only for the female photographers to see but for numerous males in modern society. The other thing is that in investigating just how important a belief this was, it came down to her candid admissions that it was a matter of her being "more comfortable" and to me that really is not strong enough to fetter the accused's rights to make full answer and defence.
>
> So in making the admittedly difficult decision and balancing the complainant's right of religion against the accused's right to make full answer and defence including the right to disclosure upon a preliminary inquiry, I find that the complainant's religious belief is not that strong, that it is not [*sic?*] open to exceptions and that it is, as she says, a matter of comfort and I think she has to testify in this preliminary inquiry without the use of her veil.

18. N.S. sought extraordinary remedy relief and at the same time brought an originating Charter application, both in Superior Court. That Court held as follows.

- The preliminary inquiry judge exceeded his jurisdiction: "... he balanced *Charter* values which he cannot do because he is not a court of competent jurisdiction" [15]

[15] Reasons, Superior Court, paragraphs 83 and 84

- The preliminary judge "has jurisdiction to order the veil removed", and if the applicant refuses to comply, the preliminary inquiry judge "has the option of refusing to admit her evidence on the preliminary inquiry itself". [16]

- The Court ordered an inquiry into the nature of the cross-examination of N.S. The Court held that even if N.S. wears her veil for a valid religious reason, the preliminary inquiry judge has the jurisdiction to exclude her evidence if the wearing of the veil means that there has not been cross-examination as that term is understood by s.540(1) of the *Criminal Code*.[17]

- The Court ordered that that testimony of N.S. had to be videotaped to "permit meaningful judicial review".

- The Court dismissed N.S.'s originating *Charter* application, reasoning that "If I were to give directions permitting or denying the veiled testimony without seeing it, the argument concerning cross-examination is essentially speculation". [18]

19. The Court of Appeal held that a preliminary inquiry judge does not have jurisdiction to grant Charter remedies, but does have jurisdiction to regulate preliminary inquiry proceedings consistently with Charter values. As such the preliminary inquiry judge has the power to conduct a full inquiry, balance religious freedom with full answer and defence, and order a complainant to remove her niqab. The Court emphasized that this issue cannot be resolved globally, but must be assessed on a case by case basis. The Court directed that a judge at either a preliminary inquiry or trial must engage in a fact-specific inquiry that properly reconciles the competing rights of full answer and defence and freedom of religion appropriately by giving effect to both. During that fact-specific inquiry,

> A judge can take judicial notice of the relevance of demeanour to the assessment of a witness's credibility and reliability. The judge could also take judicial notice of the potential assistance that demeanour could afford to the cross-examiner in the course of conducting that cross-examination.[19]

20. The Court of Appeal emphasized that the inquiry must be sensitive to context, and discussed a number of contextual factors that may affect the inquiry. Based on the the Court's

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[16] Reasons, Superior Court, paragraph 88
[17] Reasons, Superior Court, paragraphs 102-107
[18] Reasons, Superior Court, paragraph 120
[19] Reasons, Court of Appeal, paragraph 72

conclusion that a contextual and fact-based inquiry is necessary, the Court concluded that the present factual record was inadequate. The Court therefore sent the matter back to the preliminary inquiry judge, directing that he must conduct a new inquiry consistently with the directions provided by the Court into whether N.S. should remove her niqab to testify.

PART II

QUESTION IN ISSUE

21. Q: Must a sincerely observant niqab wearing sexual assault complainant partially disrobe – remove her niqab – as a condition of participation in courtroom proceedings?
A: No

PART III

ARGUMENT

To see the truth you need only close your eyes

22. Superficially, this case presents an apparent conflict between N.S.'s equality and religious freedom based right to wear her niqab in the witness box, and the accused persons' full answer and defence right to see her face. On deeper inspection the conflict falls away. Why? Because a niqab has no impact on full answer and defence. Why? Because facial cues are not helpful in determining credibility, so a niqab occasions no harm.

23. Professor Bakht surveys the research literature on point and offers the following.[20]

> Paul Ekman in his study of lying found that with rare exception, 'no one can do better than chance at spotting liars simply by their demeanour' (Ekman 1992). It is amazing to many people when they learn that all of the other professional groups concerned with lying—judges, trial attorneys, police, polygraphers who work for the CIA, FBI or NSA

[20] Bakht, Natasha, "Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms", in Grillo et al. eds., *Cultural Diversity and Law* (London: Ashgate Publishing 2008) at p. 9

> (National Security Agency), the military services, and psychiatrists who do forensic work—did no better than chance. Equally astonishing, most of them didn't know they could not detect deceit from demeanour (Seniuk 2000, 4).

24. Professor Jonathan Freedman of the University of Toronto, in a research report entitled "Are Facial Features and Movements Helpful in Detecting Lying?"[21], states as follows.

> The question is whether assuming that the content of what someone says does not reveal that it is a lie, can an observer reliably recognize when someone is lying using only cues from observing and listening to the person? The answer is that people are quite poor at detecting deception. Even when observers are given full audio and visual information (they can see and hear the speaker), they are by and large not much better than chance at detecting lying. Over many studies, in many different situations, with many different kinds of judges, the accuracy rate is just slightly better than chance. …
>
> All of those who have studied this question are agreed that in general people cannot detect lying very well. Some believe that detection can be somewhat above chance; others that it is no better than chance. But all agree that it is not very good. I have not found any published scientific paper that takes the opposite view.

25. If we focus more narrowly on facial cues, which are the only demeanour cues in issue here, the reliability of demeanour assessments probably sinks lower. Professor Freedman comments as follows.

> What matters is whether untrained people can use facial cues to detect deception reliably. On this there is unanimous agreement that facial cues do not increase accuracy in detecting lying. …
> There is some evidence that relying on facial cues may actually reduce overall accuracy. This seems to be because many people have intuitive or learned beliefs about facial cues that are incorrect or only sometimes correct. …

26. In sum, whether on their own or combined with other cues, facial cues are not helpful in detecting lying by untrained observers.[22]

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[21] Unpublished research report, 2010 at pp.1,2
[22] Freedman, above at p.3

27. There is also both artificiality and cultural contingency in demeanour assessment, because the practice is premised on unstated yet baseless assumptions that nonverbal cues have fixed meanings. Lawyers and fact finders rarely know the witnesses they encounter. So the assumptions they use in assessing nonverbal cues are foisted blindly on the witness without regard for accuracy.[23] The ignorant behavioural assumption that every woman raped would swiftly cry out founded the now discredited doctrine of recent complaint. Another notoriously ill-founded demeanour or behavioural assumption is that avoiding eye contact means dishonesty. Professor Freedman debunks that myth as follows.

> … most white Canadians tend to perceive those who avert their eyes as shifty or dishonest; whereas in most Aboriginal communities in Canada, direct eye contact is seen as rude and aggressive and gaze aversion is seen as respectful, especially to authority. In any case, as far as we know, regardless of culture, there is no evidence that gaze aversion is, in fact, an indication of lying.[24]

28. Our demonstrated inability to detect lying from facial cues is made more dangerous by misplaced confidence that we can. Professor Freedman explains as follows.

> One of the difficulties of dealing with this issue is that most people think that they are quite good at detecting deception. …
> Whatever the reason, people are much too confident of their ability to detect lying. Throughout the research cited above, participants are asked how confident they are of their ratings of lying. They are usually quite confident and, more importantly, there is little or no relationship between their level of confidence and their accuracy. Thus, jurors who are very confident of their judgments are just as likely to be wrong as are jurors who are less confident. However, we know that people are influenced by others who are confident of their opinions, so the confident jurors will probably have more (and undue) influence in jury deliberations.[25]

29. The implications of inappropriate over-confidence in demeanour assessments are troubling. We are not good at discerning truth from demeanour assessment, and all too often mistakenly think we are. This is a recipe for miscarriages of justice.

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[23] Bakht, Accommodating Niqab Wearing Women above, at pp.9-10
[24] Freedman, above at p.3
[25] Same at pp.3,4

30. The serious problems with assessing demeanour has led the Court of Appeal for Ontario to observe that "perceptions of guilt based on demeanour are likely to depend on highly subjective impressions".[26] Professor Freedman goes further.

> [B]eing able to observe facial expressions is not helpful in judging whether the person is telling the truth.[27]

31. All the research based conclusions on the dangers of demeanour accord with common sense. Poker is an interesting game precisely because demeanour can be so misleading. And if we start a conversation with our eyes open, then close our eyes and continue the conversation, understanding is remarkably and demonstrably unimpaired. To see the truth about how unhelpful demeanour really is, we need only close our eyes.

32. Based on unequivocal peer reviewed research, common sense, and the unscientific and dangerously over confident way demeanour is actually used in the courtroom, it is easy to see why reliance on demeanour is problematic. To repeat Professor Freedman's words, "there is unanimous agreement that facial cues do not increase accuracy in detecting lying", and, "relying on facial cues may actually reduce overall accuracy". Thus, if a niqab affects demeanour assessments, it affects something inconsequential.

33. Courts are unique among social institutions in that there is no acceptable margin of error in justice outcomes. There is no acceptable level of wrongful convictions, no acceptable level of wrongful acquittals. In this context we need to be clear-eyed about the problem of reaching conclusions based on reading facial cues. The scientific consensus is that reading facial cues delivers accurate outcomes at a level no better than chance or slightly higher. As such, reading facial cues is a woefully, indeed shamefully imprecise tool to rely upon, even partially, in delivering justice outcomes. A practice with an error rate approaching 50% has no place where the only acceptable error rate is zero.

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[26] *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.) at 81

[27] Freedman, above at p.4

34. Furthermore, despite traditional judicial acknowledgement of the role of demeanour assessment at trial, our actual commitment to the practice is already riddled with well placed trepidation. Consider the blistering indictment in this oft-repeated nugget:[28]

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.

35. It is hard to be more dismissive of demeanour assessments than to label them arbitrary.

36. The Canadian Judicial Council takes a similarly jaundiced view of the practical utility of deameanour assessments. The relevant CJC model jury instruction is so riddled with cautions, it all but dismisses reliance on demeanour:[29]

> What is the witness's manner when he or she testifies? Do not jump to conclusions, however, based entirely on how a witness testifies. Looks can be deceiving. Giving evidence in a trial is not a common experience. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or even the most important factor in your decision.

This uncontroversial boilerplate direction bears close scrutiny. If looks can be deceiving – which is undoubtedly true – and if witnesses have different backgrounds, abilities, values and life experiences that are unknown to fact finders and that are inevitably going to be affect how they present, how can any conscientious fact finder know when reliance on demeanour will or will not be misplaced? So how can any conscientious fact finder place *any* reliance on demeanour at any time? Reliance on demeanour is dangerously arbitrary and that, of course, is the subtext of the instruction. Deepest meaning often lurks in subtext.

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[28] Farnya v. Chorny, [1951] B.C.J. No. 152 (C.A.) at paragraph 10

[29] Canadian Judicial Council, Model Jury Instructions in Criminal Matters, Instruction 4.11, Assessing Evidence, paragraph 11 http://www.courts.ns.ca/General/resource_docs/jury_instr_model_april04.pdf

37. The scientific consensus is that facial cues do not increase accuracy in detecting lying; and our overconfidence about our ability to read facial cues can be dangerous. However, even assuming, contrary to the scientific consensus, that demeanour might be helpful, a niqab is still benign because many demeanour cues remain despite the niqab. For example:

- Eye contact is unaffected by a niqab. The accused can still face his accuser.
- Evasion of eye contact remains readily ascertainable, for what it's worth.
- Eyes are a primary vehicle for expressing the entire range of human emotions.
- Eyes and the rest of the face are tightly coordinated in the expression of emotion. Therefore the eyes are a reliable surrogate for whatever the rest of the face expresses.
- Body language is unaffected by the niqab.
- Voice tone and inflexion is unaffected.
- The cadence of speech, confident and smooth, or hesitant and halting, is unaffected.
- The niqab has no impact on gestures, which can send strong nonverbal messages.
- The niqab has no impact on revealing subconscious movements like shaking, nodding, tensing up or shrugging.

In sum, even with a niqab, counsel and fact finders retain access to a broad range of demeanour cues. A niqab obscures only a sub-set of facial visual cues that the scientific research dismisses as unhelpful. Taken collectively, the remaining demeanour cues assure that the impact of the niqab on demeanour assessments is negligible.

38. The preceding paragraphs have made two points: facial demeanour assessments are not helpful; and in any event a niqab does not significantly impair demeanour assessment. An important point not yet made is that demeanour assessment is not an end in itself. It is only one flawed and limited means to the end of assessing reliability of evidence. There are a host of far more dependable analytical tools to assess reliability, such as those in the CJC model jury instruction on assessing evidence, none of which are affected by a veil:

- Is there any reason why the witness would not be telling the truth?
- Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?
- Was the witness in a position to make accurate and complete observations about the event? Did he or she have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine?
- Does the witness seem to have a good memory? Does any difficulty the

witness has in remembering seem genuine, or does it seem made up as an excuse to avoid answering questions? Does the witness have any reason to remember the things about which he or she testified?

- Does the witness seem to be reporting to you what he or she saw or heard, or simply putting together an account based on information obtained from other sources, rather than personal observation?
- Does the witness's testimony seem reasonable and consistent? Is it similar to or different from what other witnesses say about the same events? Did the witness say or do something different on an earlier occasion?
- Do any inconsistencies in the witness's evidence make the main points of the testimony less believable or reliable? Is the inconsistency about something important or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because he or she failed to mention something? Is there any explanation for it? Does it make sense?[30]

These analytical factors, drawn out by cross-examination and aided by witness exclusion, more than amply equip fact finders and counsel to assess reliability. These are the tools for sound fact finding in a courtroom. They work just as well veil or no veil. They work just as well for the defence, the Crown, plaintiffs, defendants and fact finders. By comparison, demeanour assessment is a weak, faulty and insignificant little practice. The Court of Appeal for Ontario said it as follows:[31]

I do not think that an assessment of credibility based on demeanour alone is good enough in a case where there are so many significant inconsistencies. The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is paramount.

39. In this case, the preliminary inquiry judge spoke to N.S. while she was wearing her niqab. It was important that he understood both what she was saying, and how she was saying it. If the niqab had created any significant barrier he would have said so. He did not.

40. Forcing niqab wearing women to facially disrobe as a price of admission to the justice

[30] Model Jury Instruction 4.11, above, paragraphs 3-10
[31] *R. v. Norman* (1993), 26 C.R. (4th) 256 (Ont. C.A.) at para. 47

system is also deeply inconsistent with a host of other accommodations that are both directly comparable and uncontroversial. The following examples demonstrate that in a wide variety of courtroom circumstances we are perfectly content to overlook limitations on assessing demeanour, and sometimes we are perfectly content to overlook even the complete absence of opportunity to assess demeanour.

- Absent witnesses whose transcripts are read in
- Hearsay – reliability is independent of demeanour
- Audio recordings admitted for the truth of their contents
- Business records admitted for the truth of their contents
- Video statements that are not in HD
- CCTV live testimony that is not in HD
- Persons who speak with mechanical aids (Lou Gherig's disease, throat cancer, etc.)
- Stroke victims with significant facial paralysis
- Persons with significant facial disfigurement through disease, congenital defect, or trauma
- Persons with body paralysis that may affect body language
- Persons with Parkinson's disease, a disabling stutter, or other conditions that may mask demeanour
- Persons suffering from depression with flat affect
- Persons suffering from other mental illnesses (eg anxiety disorders) that amplify or distort emotional reactions
- Persons who communicate by sign language
- Persons who communicate in a language unknown to the fact finders such that fact finders cannot assess demeanour through cadence, tone and inflection
- Sub-par surreptitious video surveillance
- Demeanour cues missed while the fact finder is making notes
- Demeanour cues missed because the fact finder sits at a sub-optimal angle to the witness
- Silent demeanour cues when a party is represented by a visually impaired lawyer
- Overturning convictions with no access to demeanour - "it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable". [32]

This broad range of circumstances where we confidently assess evidence without demeanour shows that justice and demeanour assessments are not joined at the hip. Justice and

[32] *R.* v. *R.W.*, [1992] 2 S.C.R. 122

demeanour really have at best only a casual, non-committed relationship of convenience. Demeanour is important, except when it's not.

41. Upon close examination, a niqab has no adverse impact on assessing reliability of evidence. And courts in many circumstances already assess evidence without access to facial cues. So the rest of this case is easy. A niqab in the courtroom is just as benign as a clerical collar, a turban or a yarmulke. Neither counsel nor fact finders are hindered by any such articles of religious clothing, so none of them should be banned at the courtroom door as a discriminatory price of admission.

42. On the other side of the coin, forced removal of a niqab would not give counsel or fact finders any additional reliable assessment tools. Yet it would intrude deeply into the religious and equality rights of the woman affected, her full answer and defence rights if she is an accused person, her psychological integrity, and the quality of her evidence.

43. Simply put, accommodating niqab wearing women has no downside.

The Court of Appeal's Central Misstep

44. The Court below said a " judge can take judicial notice of the relevance of demeanour to the assessment of a witness's credibility and reliability."[33] This is the Court's central misstep.

45. Judicial notice is reserved for what is so notoriously true that it would be a waste of time to require proof. Based on the prevailing scientific consensus, the value of demeanour assessments does not come close to sitting in this category. Quite the contrary, there is unanimous agreement that facial cues do not increase accuracy in detecting lying and may reduce accuracy; and courts frequently receive evidence without regard for demeanour in a wide variety of circumstances and without adverse affect. So by placing a presumed and fixed value on demeanour the Court made the following three mistakes simultaneously.

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[33] Reasons, Court of Appeal, paragraph 72

- The Court rejected uncontradicted scientific evidence without explanation.
- The Court wrongly validated assumptions about the value of facial cues despite scientific consensus to the contrary.
- The Court insulated an erroneous conclusion from critical scrutiny by according that conclusion the fixed status of a legal presumption through use of judicial notice.

46. Judicial notice cannot be misused to insulate legal traditions, however dearly held, from critical re-evaluation based on advancing insight. After Galileo it is a truism that when tradition and knowledge diverge, knowledge must prevail.

47. Misusing judicial notice to give demeanour assessments an undeserved and unassailable value puts a false weight on one side of the scales. This imbalance can cause unwarranted intrusion into a woman's equality and religious freedom rights. And it legitimizes unwarranted undervaluing of the unique and painful plight of a sexual assault complainant.

The Three Elephants in the Room

48. This case has three elephants in the room. But like all such elephants, once acknowledged they can be readily managed.

49. First, while there may be intense religious debate about whether a niqab is or is not mandated within Islam, that debate is irrelevant here. The settled jurisprudence from this Court rejects any contention that religious practice must be objectively grounded in a religious tradition to qualify for Charter s.2(a) protection:

> … the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious

doctrine, unjustifiably entangle the court in the affairs of religion.[34]

50. This Court put the point even more bluntly when it said "a court is in no position to question the validity of a religious belief". And, "Courts are not arbiters of scriptural interpretation".[35]

51. To engage her *Charter* religious freedom N.S. need only show a subjectively sincere practice with a religious nexus.[36] The record shows N.S. has worn her niqab for 5 years in sincere religious observance. Her niqab is *Charter* protected. No more inquiry is needed.

52. The limited legal test for freedom of religion, focusing on subjective sincerity of belief, is necessary to protect the faith of individuals who may dissent from the mainstream views of their religious community. It also sustains the idea that faith, even within a single belief system, will have multiple and mutable interpretations.[37]

53. All that matters here is that N.S. wears the niqab as a sincerely held religious belief, and that she has turned to her religion for comfort in the stressful and difficult circumstance of being a complainant in a sexual assault case. Her religious practices must not be questioned but must be accommodated to the greatest extent possible.

54. But being non-judgmental does not mean simply adopting a facial neutrality (pun intended) that ignores the plight of marginalized religious groups. This Court held in *Mills*,[38] that complainants have important equality rights which are directly engaged when they testify. These equality rights must be assessed with an "acute sensitivity to context". To achieve equality when there is pre-existing marginalization, courts must actively increase minority religious group participation in justice processes. As Professor Bakht has noted,

> The justice system should encourage practices which will enable as many people as possible to participate and engage with judicial processes … To force a choice

[34] *Syndicat Northcrest* v. *Amselem* 2004 SCC 47 at paragraph 50
[35] Same at paragraphs 44 and 45
[36] Same, paragraph 46
[37] Natasha Bakht, "Veiled Objections: Facing Public Opposition to the Niqab" in Lori Beaman ed., *Defining Reasonable Accommodation* (Vancouver: UBC Press, 2010).
[38] *R.* v. *Mills*, [1999] 3 S.C.R. 668 at paragraphs 90-93

> between religious identity and participation in the justice system is to put women with already limited visibility in courts in an untenable situation."[39]

55. The directive in s.27 of the Charter to enhance multiculturalism is another source of the duty of courts to be pro-actively inclusive. A pro-actively inclusive, non-judgmental approach to freedom of religion may sometimes involve confronting the ugly spectre of conscious or unconscious prejudice. *Parks* challenges for cause in visible minority jury cases are one example of the legal system's commendable pro-active responses to prejudice. With similar pro-active vigilance we must confront any possibility here of a subtext of Islamophobia.

> The niqab is experienced by non-wearers as a form of confrontation or criticism against national ways of living and dressing. Niqabs are understood as plainly offensive to the values we cherish. "The ostentatious nature of (the burqa) can be understood as a hostile rejection of our open Western societies that one day welcomed those people as guests" Niqab-wearing women are perceived as "ungrateful" for not flattering their hosts by imitating their ways. These notions draw on a set of power relations that displace and perhaps render impossible "equality between the 'giver' and the 'taker.'"
>
> ...objections to the niqab are essentially attempts to further marginalize an already targeted religious minority. These objections are designed to prevent Muslim women from taking their rightful place as active members in public life. This pervasive anti-Muslim sentiment, what some have called Islamophobia, cannot be masked by practices that accept certain Muslims who fit within our secular notion of a good Muslim or who appear more palatable because they are "like us"...The real lesson here is that we might be better served by focusing our gaze inward and rigorously questioning our own assumptions. [40]

56. Second, while there may be intense social debate about the niqab, that debate too, is irrelevant. Professor Bakht put the point in this way.[41]

> regardless of the reasons why some Muslim women wear the veil, no matter the kind of veil it may be, and even if one believes that their choice is the result of false consciousness, for these women the veil is a critical factor of their being. To deny them access to a fundamental

[39] Bakht, Accommodating Niqab Wearing Women above at p.22
[40] Bakht, Veiled Objections above at pp.19-20, 29 Footnotes omitted.
[41] Bakht, Natasha, Accommodating Niqab-Wearing Women in Courtrooms, above at p.4

legal institution on the basis of their identity is to deny them their dignity.

57. To many first nations persons who have endured years of abuse in residential schools run by churches, the visible symbols of Christianity may well have nothing to do with religion and everything to do with imperialism, cultural subjugation, and infathomable cruelty. Thoughtful atheists may see all attachments to religious garb and symbolism as dangerous nonsense: the oppressive fallout of pernicious indoctrination of helpless children by their religious parents and their parents' religious leaders.[42] And secularist social thinkers may see a niqab as an aggressive affront to their good faith efforts to promote enlightened communal secular values. But views like these, however strongly and even truly held, simply raise serious and deep questions about the multiple dimensions of truth. They certainly do not permit courts to take sides and prohibit witnesses from wearing in the witness box religious symbols they personally cherish.

58. Judicial prohibitions of benign religious garb based on arguments that the religion, the religious practice, or its practitioners are in any way wrong amount to state imposed orthodoxy. Vastly differing yet deeply held perceptions of religious symbols and attire are inevitable in a multi-cultural, largely secularized environment. Consequently, sincere subjective importance to the witness is the only consistent and tenable foundation upon which to construct meaningful, comprehensive inclusion. If religious garb sincerely works for the wearer and does not seriously compromise the proceedings, the court's inquiry ends.

59. In asking whether religious garb seriously compromises courtroom proceedings we must identify an important distinction: that between the functional effect of the article in question, and its aesthetic. Humans derive great meaning from their visual environment. Therefore, we can have strong visceral reactions to garments we perceive as jarring departures from our comfortable visual surroundings. To some, a niqab may be just such a jarring departure from

[42] Richard Dawkins, *The God Delusion* (2006) chapter 9, "Childhood, abuse, and the escape from religion"; Christopher Hitchens, *god is not Great: How Religion Poisons Everything* (2007) chapter 16 "Is Religion Child Abuse?"

a comfortable visual environment where exposed faces are the norm: in other words, a niqab is to such persons aesthetically displeasing, or even aesthetically offensive. And that visceral taking of offense for aesthetic reasons can be dangerously amplified by thoughtlessly attaching to a niqab some pejorative symbolic meaning unintended by the wearer herself.

60. Inevitable though these visceral reactions to jarring aesthetic difference may be, mere aesthetic displeasure, compounded by thoughtless attribution of erroneous pejorative symbolic meaning, cannot hijack the analysis of whether a niqab compromises courtroom proceedings. Because aesthetic perceptions evolve; in other words, we get used to seeing what we see repeatedly and it becomes no big deal anymore. And visceral pejorative presumptions about the symbolic meaning of garments are also problematically superficial: when consciously unpacked and examined, they are usually found wanting.

61. For example, turbans in lieu of traditional police peaked caps were once a flashpoint of heated controversy. Now they don't raise an eyebrow. Functional arguments against turbans on police officers are dated, disproven by experience, and often a smokescreen for discrimination. To avoid similar mistakes here, the focus must be on the functional effect of the niqab, not on visceral reactions and assumed meanings. As discussed above, the scientific consensus suggests the effect of a niqab on assessing reliability is negligible; and from the perspective of functional courtrooms, nothing else matters.

62. Third, the eradication of the justice system's suboptimal treatment of sexual assault complainants remains a work in progress. Insensitivity to complainants' legitimate needs can make trials unfair, and leave crimes unreported by victims who lose faith in the courts. So courts must be continuously self-critical to ensure they evolve congruently with new insight into the unique plight of complainants. As this Court has stated in *R.* v. *Mills*, "an assessment of the fairness of the trial process must be made from the point of view of fairness in the eyes

of the community and the complainant and not just the accused".[43] That Charter-mandated assessment is as much a living tree as anything else in constitutional law.

63. It follows that religious practices that bring comfort to the ordeal of being a sexual assault complainant should be welcomed. Professor Bakht puts it this way.[44]

> A niqab-wearing woman may be in a court not of her own choice. She may be a reluctant witness or a fearful victim/complainant who has been subject to abuse. In such instances the very act of removing the veil combined with the added pressure of appearing in a court could be traumatic enough to have an adverse impact on the quality of evidence given. Judges will be unlikely to distinguish these various strains on a woman's testimony. In ensuring a fair hearing, judges should ask, 'What is required to enable a woman wearing a *niqab* to participate in the legal process, to facilitate her ability to give her best evidence and to ensure, so far as practicable, a fair hearing for both sides?' ... Forcing a woman to choose between giving evidence to secure a conviction and wearing the niqab seems contrary to a just and impartial process.

Further, the mere prospect of litigation over a complainant's right to wear her niqab in the witness box should be avoided because such barriers to access to the courts may be a powerful deterrent to reporting an already under-reported crime.[45]

64. In short, there may be no worse, no more insensitive time to force a religious woman to remove an article of faith than when she is about to step into the sterile emptiness of the witness box and face public cross-examination on the details of the most traumatic and intimately intrusive event in her life. Forcing a woman to choose between taking off her veil to feel exposed, humiliated and profaned, or walking away from redress in our criminal courts, is a terrible burden to place upon her. Especially when, like many, she comes to court fearfully in the first place, and under the impression that since she has a right of access, she will be welcomed.

65. Arguments that fail to acknowledge these three elephants in the room don't help.

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[43] *R.* v. *Mills*, above at paragraph 72

[44] Bakht,Accommodating Niqab Wearing Women above at p.19

[45] See, for example Mills at paragraph 85 where the same analysis was applied to justify the confidentiality of therapeutic records of sexual assault complainants.

The Bigger Picture

66. The bigger picture cannot be ignored: niqab wearing women may be complainants, they may be accused persons; they may be plaintiffs, or defendants; and they may be witnesses called by any party in any proceeding. If we focus exclusively on just one oppositional dialogue - niqab wearing complainants versus accused persons - we overlook the important fact that this case is about reliably assessing the evidence of witnesses of all kinds.

67. So, what if a niqab wearing witness is the accused in a criminal case? Our well founded focus on the rights of accused persons would lead us to start with a determination to accommodate her interests to the greatest extent possible. We would then look closely at the scientific research discussed above, and quickly learn there is unanimous agreement that facial cues do not increase accuracy in detecting lying, and may actually reduce accuracy: so covering some of these facial cues with a veil takes away nothing of value and may even help by eliminating misleading information. From there we would readily and rightly conclude the accused person is entitled in fairness to be sustained in the witness box by the comfort of her niqab during what is likely to be one of the most important and difficult events in her life.

68. Having concluded that an accused person can wear her niqab in the witness box, we would then quickly realize it is wrong to treat any other witness with any less respect.

Practical Guidance for Busy Trial Courts

69. The Courts below made this case more complicated than it needs to be. A busy lawyer or judge in a trial or preliminary inquiry faced with a niqab wearing witness could be forgiven for toiling through the Court of Appeal's 54 pages of reasons and then still wondering, "what am I supposed to do now?" A niqab is many things - lightning rod included - to many people in the complicated religious and social debates that surround and define the garment, its

symbolism and those who wear it. But from the perspective of court processes, which is the only perspective that matters here, the niqab is a benign garment with no scientifically supported adverse impact on a fact finder's job. Therefore, if a niqab is worn as a sincerely held religious belief – which can be determined in a question or two – the woman's right to wear it prevails at both preliminary inquiry and trial.

70. Structural and functional differences between a preliminary inquiry and a trial are irrelevant here because the niqab is equally benign, and equally important to the woman wearing it, in both proceedings. Conversely, any court ordered removal of a veil at a preliminary inquiry will in practical terms pre-determine the trial outcome on the same issue, which of course is wrong. And court-ordered removal at the preliminary inquiry may also force religiously observant women to abandon any hope of having their voices heard on the merits long before a trial can occur. So while a sincerely worn niqab need not come off at either preliminary inquiry or trial, it is particularly odious to contemplate its removal at a preliminary inquiry where credibility is not even in issue.

71. Since the question to be resolved is actually quite simple, this case can go back to the preliminary inquiry and proceed without further ado. N.S. has already made it clear on the record that she wears her niqab as a matter of sincere religious observance. So she need not partially disrobe and she need not face any further barriers to justice by enduring additional litigation around her niqab. She can simply testify wearing her niqab at both the preliminary inquiry and trial if there is one.

72. In future cases, at both preliminary inquiry and trial, the only question preceding the testimony of a niqab wearing witness should be the very limited one into whether it is worn as a sincere practice with a nexus to religion.

Necessity and Reliability: Different Route to the Same Result

73. The Charter issue here is evidentiary: respecting Charter rights of a witness without compromising the fact finder in assessing reliability. The law of evidence has evolved from a pigeonhole approach, to a first principles approach based on necessity and reliability. The dependable tools of necessity and reliability work well here. It is a matter of necessity (respect for Charter rights to religious freedom and equality) that N.S. wear her niqab. On the other hand, the limited facial demeanour cues covered by a veil have little practical value, and may be misleading. So their absence has no adverse affect on exploring N.S.'s reliability. On a necessity/reliability analysis, N.S. can wear her veil in the witness box.

Conclusion

74. Rhetoric is nice, but evidence is nicer. The uncontradicted scientific evidence says a niqab in the courtroom is benign. Violating equality rights, religious freedom, the well-being of sexual assault complainants, and marginalizing a religious minority is anything but benign.

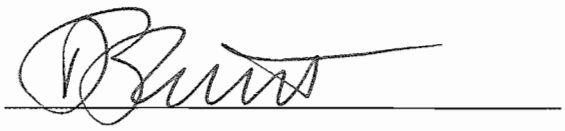
PART IV
COSTS

75. This Court has already ordered that the Attorney General of Ontario shall pay the costs of this appeal for N.S. If necessary, and subject to the direction of this Court, a motion will be brought to settle the actual costs.

PART V
ORDERS SOUGHT

76. N.S. requests that the appeal be allowed and the matter be remitted to the preliminary inquiry for continuation with a direction that she be permitted to wear her niqab throughout both the preliminary inquiry and any trial that may follow.

ALL OF WHICH is respectfully submitted on July 29, 2011 by



David Butt

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PART VI

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2. Richard Dawkins, *The God Delusion* (2006) chapter 9, "Childhood, abuse, and the escape from religion" – paragraph 57

3. Christopher Hitchens, *god is not Great*: *How Religion Poisons Everything* (2007) chapter 16 "Is Religion Child Abuse?" – paragraph 57

4. Canadian Judicial Council, Model Jury Instructions in Criminal Matters, Instruction 4.11, Assessing Evidence http://www.courts.ns.ca/General/resource_docs/jury_instr_model_april04.pdf paragraphs 36, 38

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6. *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.) at 81 – paragraph 30

7. *R.* v. *Mills*, [1999] 3 S.C.R. 668 – paragraphs 54, 62, 63

8. *R. v. Norman* (1993), 26 C.R. (4th) 256 (Ont. C.A.) – paragraph 38

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