Face-coverings, demeanour evidence and the right to a fair trial: lessons from the USA and Canada

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Abstract

The demeanour of a witness is generally considered an important factor in assessing the credibility of that witness. Some empirical studies have, however, questioned the value of demeanour evidence. This article considers the value of demeanour evidence in view of the accused's right to a fair trial. It is restricted to situations where a witness's identity is already known, but the witness wishes to testify with some form of face-covering. It is submitted that the accused's right to adduce and challenge evidence will ensure the court's and the accused's access to all possible forms of demeanour evidence. Only in exceptional circumstances will the public interest allow this principle to be limited if the reliability of the evidence can otherwise be ensured.

INTRODUCTION[**]

It is generally accepted that a court's ability to observe the demeanour of a witness contributes to a reliable assessment of credibility.[1] The demeanour of witnesses is considered to be real evidence, as when a court takes note of a witness's demeanour, it is in effect observing an evidentiary fact.[2] It can be said

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1 See generally, Schwikkard & Van der Merwe *Principles of evidence* (3ed 2009) par 30 4.

2 Dennis *The Law of Evidence* (3ed 2007) 502 notes: 'The demeanour is an item of information from which inferences may be drawn about the probative value of the testimony, in the same way as inferences might be drawn from proof, for example, that the witness has previous convictions for perjury. Accordingly, demeanour is rightly treated as an item of real evidence analogous to the appearance of persons and the observable qualities of an object.'

that demeanour bears 'circumstantially upon the evaluation of the probative value to be given to other evidence in the case'.[3] The evidential value of demeanour evidence is, however, controversial and some commentators have suggested that such evidence be discarded when assessing the credibility of a witness.

Although it can be said that demeanour evidence often has a limited role to play in assessing the credibility of a witness, the fact remains that 'it can be the factor that tips the scale beyond a reasonable doubt'.[4] In this regard, the accused's right to adduce and challenge evidence, which forms part of the broader right to a fair trial, will dictate the continued importance of demeanour evidence in assessing the credibility of a witness.[5] Not only should a trier of fact in principle have access to all possible forms of demeanour evidence, but proper cross-examination could also be prevented if an accused cannot fully observe the reaction of a witness to a question.

The article only considers access to demeanour evidence where a witness wishes to testify while wearing some form of face-covering such as a veil or sunglasses. The accused can, therefore, fully observe the witness, but some part or parts of the witness's face may be covered. The article is further restricted to cases where the identity of the particular witness is already known and there is also no serious threat to the safety of such a witness.[6]

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3 Graham *Handbook of federal evidence* vol 2 (7ed 2012) 495. This is in contrast to a situation where a court acts on the remarks or behaviour of a witness that is viewed as constituting contempt. In such a case the court accepts real evidence because it is not asked to do more than act on its powers of perception in determining the existence of a fact in issue.

4 Morrison, Porter & Fraser 'The role of demeanour in assessing the credibility of witnesses' (2007) 33 *Advocates'Q* 170 at 184. Also see Hoffman *The South African law of evidence* (1970) 434, noting of demeanour evidence that: 'It should be allowed only to reinforce a conclusion reached by an objective assessment of the probabilities or possibly to turn the scale when the probabilities are evenly balanced.'

5 Section 35(3) of the Constitution of the Republic of South Africa, 1996 states that: 'Every accused has the right to a fair trial, which includes the right 35(3)(i) to adduce and challenge evidence.'

6 When a witness wishes to testify anonymously or in total disguise because of real concerns for his or her safety, similar but much wider issues are at stake – see generally Naudé 'The absolute anonymity of a state witness' (2011) 32 *Obiter* 158. For a recent discussion in this regard, see Karsai 'You can't give my name: rethinking witness anonymity in light of the United States and British experience' (2011–2012) 79 *TennLRev* 29.

The right of an accused to a fair trial and its application to demeanour evidence is considered with reference to American and Canadian law because the constitutionally entrenched right to confrontation in American law[7] can be compared to the accused's constitutional right to adduce and challenge evidence in South African law. Similar constitutional provisions exist in Canadian law, where such rights form part of the broader right to a fair trial.[8]

DEMEANOUR'S DOUBTFUL EVIDENTIAL VALUE

Demeanour has been described as 'every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary or involuntary, simple or complex'.[9] Evidence of demeanour includes witnesses' attitude, their manner of testifying, their behaviour in the witness-box, whether the witness is clear or confused, helpful or evasive, confident or nervous when answering questions, their character and personality and the impression they create.[10]

When a witness is evasive, or reluctant to testify or hesitates when answering questions, it is understandable that such conduct might impact on credibility. Non-verbal communications such as bodily movements, body language, or facial expressions are also considered relevant in this regard.[11] It is, however, controversial whether such evidence should have any probative value as far as credibility is concerned, since various studies purport to have found the reliance on facial expressions and other evidence of demeanour to determine credibility,

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7 The Sixth Amendment to the US Constitution guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him'.

8 See the discussion of the Canadian Supreme Court case of *R v NS* (2012) SCC 72 below.

9 Morrison, Porter & Fraser n 4 above at 179 (referring to Stone 'Instant lie detection? Demeanour and credibility in criminal trials' (1991) *CrimLRev* 821 at 822). For a useful exposition of the meaning of demeanour, see Timony 'Demeanor credibility' (1999–2000) 49 *CathULRev* 903 at 913.

10 See *Cloete v Birch* 1993 2 PH F17 (E) at 51.

11 Included here is behaviour such as nervous fidgeting, facial twitching and the blushing of a witness. Nokes *An introduction to evidence* (4ed 1967) 449 notes: '[T]he blush of a witness is as real as a dried blood-stain on a knife.' See generally, Morrison, Porter & Fraser n 4 above for a discussion of the physiological and psychological aspects of body language. See also Williams 'The veiled truth: can the credibility of testimony given by a niqab-wearing witness be judged without the assistance of facial expressions?' (2007–2008) 85 *UDetMercyLRev* 273 at 274 for a discussion of how non-verbal communication takes place in court.

to be misplaced.[12]

Simply put, it is possible that an honest witness may be shy or nervous by nature while a dishonest and crafty witness may simulate an honest demeanour. Further, it would be wrong to assume that those who are lying display behavioural signs of lying, or that those who are telling the truth will not show signs that may create the appearance of lying.[13]

The fact that courts regularly accept the testimony of witnesses whose demeanour can be partly observed, further underlines the fact that demeanour evidence plays a small part in a credibility finding. When an interpreter is used, for example, the trier of fact has to make credibility findings 'through the filters

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[12] See generally Vrij *Detecting lies and deceit: the psychology of lying and implications for professional practice* (2000); Wellborn 'Demeanor' (1991) 76 *CornellLRev* 1075; Blumenthal 'A wipe of the hands, a lick of the lips: the validity of demeanor evidence in assessing witness credibility' (1993) 72 *NebLRev* 1157; Williams n 11 above at 287. Minzner 'Detecting lies using demeanor, bias, and context' (2007–2008) 29 *CardozoLRev* 2557 at 2565 points to studies that have shown that few reliable cues to deception exist and that in particular, the cues widely believed to signify deception generally do not. See also Stone n 9 above who argues that there is no sound basis from physiology or psychology for assessing credibility from demeanour. The *Canadian Judicial Council Model Jury Instructions, Part I, Preliminary Instructions 4.11 Assessing Testimony* available at: LINK"http://www.cjc-ccm.gc.ca/cmslib/general/jury-instructions/"http://www.cjc-ccm.gc.ca/cmslib/general/jury-instructions/ (last accessed 12 April 2013) also notes: 'What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on the witness's manner. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.' (*Cf* the remarks made in this regard by the court in *President of the RSA v SARFU* 2000 1 SA 1 (CC) at par 79.)

[13] South African courts have pointed out that caution should be exercised when considering the effect of demeanour evidence on the credibility of a witness – see *S v Kelly* 1980 3 SA 301 (A) at 308B–D; *Kaluza v Braeuer* 1926 AD 243 at 266; *Arter v Burt* 1922 AD 303 at 306; *Allie v Food World Stores Distribution Centre (Pty) Ltd* 2004 2 SA 433 (SCA) at par 40; *R v Masemang* 1950 2 SA 488 (A); *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 1 SA 515 (HA) at par 38; *S v Civa* 1974 3 SA 844 (T); *S v Malepane* 1979 1 SA 1009 (W) at 1016H–1017A; *Body Corporate of Dumbarton Oaks v Faiga* 1999 1 SA 975 (SCA); *S v V* 2000 1 SACR 453 (SCA) at 455f–h; *Patel v Patel* 1946 CPD 46; *Santam Bpk v Biddulph* 2004 5 SA 586 (SCA) at par 16; *R v Dhlumayo* 1948 2 SA 677 (A) at 697; *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 5 SA 339 (SCA) at par 14). For a sceptical appraisal in the English law context, see *The Law Commission*: *Evidence in Criminal Proceedings (Hearsay and Related Topics)* No 245 (1996) at par 3.09–3.12.

of interpreters'.[14] In other cases, such as exceptions to the hearsay rule, the trier of fact is completely unable to assess the demeanour of the person whose statement is being admitted as evidence.[15] Appeal judges also do not have the opportunity to see and hear witnesses.[16]

Perhaps demeanour has very little value as far as credibility is concerned where a witness had been fully exposed to examination-in-chief, cross-examination and re-examination and 'a reasonably complete picture of the witness's veracity, bias and motivation' has been established.[17] In cases where a witness, for example, wears a face-veil or sunglasses it would still be possible to draw a conclusion about credibility, since the court can judge aspects like the witness's integrity, candour, temperament, personality, intellect, objectivity and ability to communicate what he/she intends to say without seeing his/her face.

It is not the purpose of this article to examine the evidential value of demeanour evidence, as it can be accepted that it is often in doubt. This does not, however, remove the importance of putting demeanour evidence before court. There is always the possibility that such evidence might influence the outcome of a case, and courts the world over still consider it a factor in credibility assessment. The accused's right to adduce and challenge evidence that forms part of the broader right to a fair trial, requires that a trier of fact should, in principle, have access to all possible forms of demeanour evidence.[18] Proper cross-examination could be hampered if an accused is unable to form a complete observation of a witness's demeanour. Insights in this regard can be gained from the approaches by the Supreme Court of both the USA and Canada, where the right to confrontation can be compared to the right to adduce and challenge evidence in

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14 See *R v AF* (2005) 376 AR 124 (CA) at par 3.

15 See also the *Canadian Criminal Code* RSC 1985, c C–46, that allows a judge to order and admit a transcript of evidence by a witness who is unable to attend the trial because of a disability, even when the accused's counsel is not present for the taking of the evidence (ss 709 and 713). The *Criminal Code* also allows witnesses to give evidence and be cross-examined by telephone (s 714.3).

16 Perhaps this rather emphasises that everything reasonably possible should be done to ensure the accurate gathering of information by the trial judge.

17 See *US v McLaughlin* 957 F 2d 12 (1st Cir 1992) 17.

18 Section 35(3) of the Constitution of the Republic of South Africa, 1996 states that: 'Every accused has the right to a fair trial, which includes the right … (i) to adduce and challenge evidence.' It is generally accepted that the ability to see a witness's face is an important feature of a fair trial.

terms of the South African law.

ACCESS TO DEMEANOUR EVIDENCE AS A FAIR TRIAL RIGHT

Approach by the US Supreme Court

In the USA jury instructions routinely state that consideration of demeanour is not only permitted, but expected. Furthermore, such consideration is not only the right, but also the duty of the trier of fact.[19] The accused's ability to observe the demeanour of a witness is further seen as an essential element of the constitutional right to confrontation. In *California v Green*,[20] the Supreme Court pointed out that the Sixth Amendment right to confront

> (1) insures that the witness will give evidence under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of penalty for perjury; (2) forces the witness to submit to cross-examination … [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing credibility.

A relevant set of facts for current purposes, arose in the US Supreme Court case of *Coy v Iowa*,[21] where the accused was charged with the sexual assault of two thirteen-year-old girls. Iowa legislation allowed the court to permit a large screen to be placed between the accused and the two complainants during their testimony. The two complainants were dimly visible to the accused, but the witnesses could not see the accused at all. The jury, however, had a full view of the complainants while they were testifying. The accused was convicted despite claiming that the use of the screen had violated his Sixth Amendment right to confront the two witnesses by, *inter alia,* arguing that the Sixth Amendment guaranteed an unobstructed, face-to-face confrontation.[22] The accused

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19 See generally *US v Shonubi* 895 F Supp 460, 480 (EDNY 1995); *Henriod v Henriod* 198 Wash 519, 524–25, 89 P 2d 222, 225 (1938); *NLRB v Dinion Coil Co* 201 F 2d 484, 487–90 (2nd Cir 1952). See the last mentioned case for a history of demeanour evidence since Roman times. See also in this regard Williams n 11 above at 275; Blumenthal n 12 above at 1158; Minzner n 12 above at 2559; Morrison, Porter & Fraser n 4 above at 179.

20 399 US 149 (1970) at 158.

21 487 US 1012 (1988).

22 *Id* at 1015.

unsuccessfully appealed to the Supreme Court of Iowa, but a further appeal to the US Supreme Court was successful.

A majority reversed the judgment of the Iowa Supreme Court by holding that the confrontation clause of the Sixth Amendment guarantees a criminal defendant a face-to-face meeting with witnesses appearing before the trier of fact. The court stated that the right to meet one's accused face-to-face, and not the right to cross-examination, is the 'irreducible literal meaning of the Clause'.[23] Based upon the Sixth Amendment's underlying policies, the court pointed out that

> [a] witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or misleading the facts," as "[i]t is always more difficult to tell a lie about a person 'to his face'".[24]

The majority decided that the defendant's right to such a meeting with the two child witnesses was violated, where *(a)* the screen was specifically designed to enable the witnesses to avoid viewing the defendant as they gave their testimony,[25] *(b)* the screen was successful in its objective, and *(c)* despite the state's claim that such a procedure was necessary to protect victims of sexual abuse, the conviction could not be sustained by any conceivable exception to the right to face-to-face confrontation.[26] The court stated that the Iowa statute, which created a generalised, legislatively imposed presumption of trauma, was not firmly rooted in the nation's jurisprudence, and there had been no individualised findings that the particular witnesses needed special protection.[27]

O'Connor J agreed with the majority, but wrote a separate judgment in which she stressed that the accused's rights under the confrontation clause are not absolute, and that they may in certain instances 'give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices

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23 *Id* at 1021 with reference to *California v Green* n 20 above at 175.

24 *Id* at 1019 with reference to Chagee *The blessings of liberty* (1956) 35. Perhaps it has more to do about the effect of the formality of the courtroom setting on the witness than about testifying in the accused's presence.

25 *Id* at 1021–22.

26 Noting at 1021 that whatever these exceptions may be, they 'would surely be allowed only when necessary to further an important public policy'.

27 *Id* at 1021.

designed to shield a child witness from the trauma of courtroom testimony'.[28] She was of the opinion that she would allow use of a particular trial procedure which entailed something other than face-to-face confrontation if such a procedure was necessary to promote an important public policy, such as the protection of child witnesses.[29] She, however, agreed with the majority that more than the type of generalised legislative finding of necessity that was present in the case was required.[30]

In a dissenting judgment, Blackmun J and Rehnquist CJ came to the conclusion that the screening procedures permitted by the Iowa legislation and employed by the trial court had not violated the confrontation clause because (a) the important public policy in protecting child witnesses from the fear and trauma associated with such children's testimony in front of a defendant, outweighed the confrontation clause's 'preference' for face-to-face confrontation,[31] and (b) the child witness had testified under oath and in full view of the jury, and had been subjected to unrestricted cross-examination.[32]

The US Supreme Court moved away from this narrow interpretation of the right to confrontation in *Maryland v Graig*.[33] The issue before the court in this case, was whether a Maryland statute which had permitted the use of one-way closed circuit television, violated the defendant's right to confrontation. In terms of this procedure, the witness would be unable to see the accused while testifying, and hence prevent trauma from looking the accused in the eye.[34] In rejecting the defendant's claim, the court pointed out that it had never been held that the confrontation clause guarantees defendants the absolute right to a face-to-face meeting with the witnesses against him or her at trial.[35] The court stated that the

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28 *Id* at 1022. See also at 1024–25.

29 *Id* at 1025.

30 *Ibid*.

31 *Id* at 1032. They pointed out that the essence of the right to confrontation essentially protects the right to be shown that the accuser is real and the right to probe the accuser and accusation in front of the trier of fact (see at 1026).

32 *Id* at 1027 and 1033. Importantly, they were of the opinion that it should not be necessary in each case, for the state to show that a specific procedure is essential to protect the child's well-being.

33 497 US 836 (1990).

34 *Id* at 841.

35 *Id* at 844. Also see at 849, where it is stated that: 'In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," *Roberts*,

central concern of the confrontation clause is to ensure the reliability of the evidence against an accused by 'subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact'.[36] The right further ensures that the witness will give his evidence under oath, and thereby bring home the seriousness of the matter and guard against lying by the possibility of a penalty for perjury. The right also forces the witness to submit to cross-examination, and permits the jury to observe the demeanour of the witness while giving evidence and, therefore, assists the jury in assessing the witness's credibility.[37] The court stated that it was the combined effect of the mentioned elements of confrontation, namely physical presence, oath, cross-examination, and observation of demeanour by the trier of fact, that served the purposes of the confrontation clause by ensuring 'that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings'.[38] The court continued, stating that:[39]

> As we have suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.

The court agreed that it was an important public policy to protect abused children from the trauma of testifying against their alleged abuser, and that the video procedure was necessary to further that interest.[40] As far as the second element of reliability was concerned, the court found that although the statutory procedure prevented a child witness from seeing the accused while he or she

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supra, 448 U.S., at 63 … a preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Mattox, supra* … .'

36 *Id* at 845 with reference to *Mattox v US* 156 US 237 (1895) at 242–243, it was stated that: 'The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'

37 *Id* at 845–46.

38 *Id* at 846.

39 *Id* at 850.

40 *Id* at 852–53.

testifies against him or her, all the other elements of the right to confrontation were preserved by the legislation. The court noted:

> The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanour (and body) of the witness as he or she testifies.[41]

While it was the majority's view that the confrontation clause was not infringed in cases where the reliability of the evidence could be assured, Scalia J disagreed.[42] He was of the opinion that 'the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation'.[43] This means that the right to confrontation is a procedural right and not a substantive right.[44] He concluded by stating that:[45]

> The Court today applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.

Maryland v Graig, therefore, confirms the reliability of the evidence against the accused as the central concern of the confrontation clause. Such reliability is ensured by the combined effect of a witness being present, giving evidence under oath, being effectively cross-examined, and the fact that the witness's

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41 *Id* at 851.

42 See from 860.

43 *Id* at 861. This argument was later the basis for the Supreme Court's decision on a different issue in *Crawford v Washington* 541 US 36 (2004). See at 61–62, where the majority, *per* Scalia J, ruled that the Confrontation Clause 'commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination'. About the possible effect of *Crawford v Washington* on the decision in *Maryland v Graig*, see generally McAllister 'The disguised witness and *Crawford's* uneasy tension with *Craig*: bringing uniformity to the Supreme Court's confrontation jurisprudence' (2009–2010) 58 *DrakeLRev* 481.

44 See also *id* at 861 where he noted with regard to the Confrontation Clause that: 'The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accuser in court.'

45 *Id* at 870.

demeanour can be observed. From the remarks made by the court, it can possibly be concluded that cross-examination and presence at the trial seem to be enough to serve the primary objective of the confrontation clause, namely to prevent depositions or *ex parte* affidavits from being used against the accused. The court does, however, include access to demeanour evidence as an important element of the right to confrontation. The case does not specifically say anything about a situation where access to demeanour evidence is fully or partly obstructed, such as in the case of a face-veil or sunglasses. Two questions arise in this regard: is effective cross-examination possible, and can a trier of fact still make a proper credibility assessment without having full access to all possible demeanour evidence. Insight in this regard can be gained from the approach adopted by the Canadian Supreme Court.[46]

Approach of the Supreme Court of Canada

Access to demeanour evidence was, *inter alia*, at issue in the Canadian Supreme Court case of *R v NS*.[47] The central issue was the accused's argument that allowing a witness to testify with her face covered by a *niqab* or face-veil, violated their right to a fair trial both by hampering effective cross-examination and by presenting an obstacle to the ability of the trier of fact to assess her credibility. In this case the accused stood charged with sexually assaulting NS. NS, who was a Muslim, was called by the state as a witness at the preliminary hearing. She indicated that, for religious reasons, she wished to testify wearing a face-veil or *niqab*.[48] The judge at the preliminary inquiry ordered her to remove her *niqab*. An appeal to the Court of Appeal was also unsuccessful, and NS consequently appealed to the Supreme Court of Canada, where the majority

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46 For US courts that have dealt with such an issue, see *Morales v Artuz* 281 F 3d 55 (2nd Cir 2002); *People v Brandon* 52 Cal. Rptr 3d 427 (Ct. App 2006); *Commonwealth v Lynch* 789 NE2d 1052 (Mass 2003); *People v Smith* 869 NYS 2d 88 (App Div 2008); *People v Sammons* 478 NW 2d 901 (Mich Ct App 1991); *Romero v State* 173 SW 3d 502 (Tex Crim App 1995).

47 Note 8 above.

48 Her religious beliefs required her to wear a *niqab* in public places where men (other than certain close family members) might see her. About such beliefs in general, see Clerget 'Timing is of the essence: reviving the neutral law of general applicability standard and applying it to restrictions against religious face coverings worn while testifying in court' (2010–2011) 18 *GeoMasonLRev* 1013 at 1016 *et seq*; Houchin 'Confronting the shadow: is forcing a Muslim witness to unveil in a criminal trial a constitutional right, or an unreasonable intrusion?' (2009) 36 *PeppLRev* 823 at 829 *et seq*. Also see Williams n 11 above. He examines the impact the *niqab* has on the fact finding process, specifically as far as it obscures non-verbal communication.

ruled that the appeal should be dismissed.

The issue was whether, if ever, a witness who wears a *niqab* for religious reasons could be required to remove it when testifying. The majority pointed out, *per* McLachlin CJ, that two sets of Charter rights are potentially engaged: the witness's freedom of religion, and the accused fair trial rights, including the right to make full answer and defence.[49] She was of the opinion that an extreme approach that would always require the witness to remove her *niqab* when testifying, or one that would never do so, is untenable. She suggested an approach that would provide a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the court.[50] A witness who for sincere religious beliefs, wishes to wear a *niqab* while testifying in a criminal proceeding will be required to remove it if (a) this is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of requiring the witness to remove the *niqab* outweigh the deleterious effects of doing so.

In applying this framework, four questions must be answered:[51] first, would requiring the witness to remove the *niqab* while testifying interfere with her religious freedom? In this regard a sincere religious belief must be shown, with the focus being on sincerity rather than strength of belief.[52] The second question is whether permitting the witness to wear the *niqab* while testifying, creates a serious risk to the fairness of the trial?[53] McLachlin CJ pointed out that there is a deeply rooted presumption in the Canadian legal system that seeing a witness's face is important to a fair trial, by enabling effective cross-examination[54] and assessing credibility. Whether trial fairness is threatened under these circumstances, will depend upon the evidence that the witness is to provide.

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49 Note 8 above at par 7. In the South African Constitution the right to religious freedom is contained in s 15 of the chapter on fundamental rights, stating *inter alia* in s 15(1) that: 'Every person shall have the right to freedom of conscience, religion, thought, belief and opinion …'. (See generally Woolman *et al Constitutional Law of South Africa* vol 3 (2ed)(Revision Service 4: 2012) 41–i *et seq*.

50 *Id* from par 8.

51 *Id* from par 9.

52 *Id* from par 10.

53 *Id* from par 15.

54 A face-covering may, for example, mask a witness's reaction to a question and therefore interfere with proper cross-examination.

Where evidence is uncontested, there will be no risk as far as the fairness of the trial is concerned and a witness who wishes to wear a *niqab* for sincere religious reasons may do so.[55] If both freedom of religion and trial fairness are engaged on the facts, a third question must be answered: is there a way to accommodate both rights and avoid the conflict between them?[56] A trier of fact must, therefore, consider whether there are readily available and reasonable alternative means that would conform to a witness's religious convictions, while still preventing a serious compromise to trial fairness.[57] Should this not be possible, a fourth question must be answered: do the salutary effects of requiring a witness to remove the *niqab* outweigh the deleterious effects of doing so?[58] Deleterious effects include the harm done by limiting the witness's sincerely held religious beliefs. In this regard a number of factors should be considered, including broader societal harms, such as discouraging women who wear the *niqab* from reporting offences and participating in the criminal justice system. Salutary effects include preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice. In this regard the trier of fact must consider whether the witness's evidence is central to the case, the extent to which effective cross-examination and credibility assessment are central to the case, and the nature of the proceedings.[59]

McLachlin CJ further stated that a clear rule that would always or never permit a witness to wear a *niqab* while testifying, cannot be sustained. Furthermore, the need to accommodate and balance sincerely held religious beliefs against other interests are deeply entrenched in Canadian law.[60] Ultimately, the appeal was dismissed and the matter remitted to the preliminary inquiry judge to be decided

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55 See *id* at par 69 where LeBel J and Rothstein J pointed out in a separate judgment, that wearing a *niqab* should not be dependent on the nature or importance of the evidence, as this could only add a new layer of complexity to the trial process. See also at par 96 where Abella J, in a minority judgment, questions the majority view that being unable to see the witness's face is acceptable from a fair trial perspective if the evidence is 'uncontested'. In essence this means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint or wearing a *niqab*, which may be no meaningful choice at all.

56 See *id* from par 30.

57 *Id* at par 85 Abella J pointed out that as far as a witness wearing a *niqab* is concerned, there is very small realistic possibility in this regard.

58 See *id* from par 30.

59 *Id* at par 39.

60 *Id* from par 47.

in accordance with the given reasons.

While agreeing with the majority, LeBel J and Rothstein J delivered a separate judgment in which they stressed that the case is not only about conflict and reconciliation between different rights, but that it engages basic values of the Canadian criminal justice system.[61] They were of the opinion that wearing a *niqab* is incompatible with the rights of the accused, the nature of the Canadian public adversarial trials, and with the constitutional values of openness and religious neutrality in a contemporary democratic, but diverse Canada. A system of open and independent courts is a core component of a democratic state ruled by law, and is a fundamental Canadian value. From this broader constitutional perspective, the trial becomes an act of communication with the public at large.[62] It is necessary that the public see how the criminal justice system works. They were further of the opinion that wearing a *niqab* in the courtroom does not facilitate acts of communication and that it rather shields the witness from interacting fully with the other parties in the case.[63]

They also stated that wearing a *niqab* should not be dependent on the nature or importance of the evidence, as this would only add another layer of complexity to the trial process.[64] They came to the conclusion that a clear rule that would prohibit the wearing of the *niqab* at any stage of the criminal trial, would be consistent with the principle of public openness of the trial process and would safeguard the integrity of that process as one of communication.

Abella J wrote a dissenting judgment in which he was of the opinion that the harmful effects of requiring a witness to remove her *niqab*, with the likely result that she would not testify or bring charges in the first place, or, if she were the accused, be unable to testify in her own defence, is a significantly more harmful consequence than the accused not being able to see a witness's entire face. He stated that unless the witness's face is directly relevant to the case, such as where her identity is at issue, she should not be required to remove her *niqab*.[65]

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61 *Id* at par 60.
62 *Id* at par 76.
63 *Id* at par 77.
64 *Id* at par 69.
65 For similar sentiments in this regard, see Williams n 11 above.

He pointed out that there was no doubt that the assessment of a witness's demeanour would be easier if it were based on being able to observe the total 'package' of demeanour, including the face, body, language, or voice.[66] He, however, felt that this was different from concluding that unless the entire package were available for scrutiny, a witness's credibility cannot adequately be weighed.[67] He stated that courts regularly accept the testimony of witnesses whose demeanour could only be partially observed, and pointed to examples where courts accept evidence from witnesses who were unable to testify under ideal circumstances because of visual, oral, or aural impediments.[68] He also referred to interpreters as an example of how a witness's demeanour may be understood, even though it was beyond dispute that the intermediation of interpreters did not render the assessment of demeanour either impossible or impracticable. He further pointed to a witness who had physical or medical limitations that affect the ability of a trier of fact to assess demeanour.[69] A stroke may, for example, interfere with facial expressions, or an illness may affect bodily movement. In the same way, speech impairments may affect the manner of speaking.[70] He pointed out that although the above examples all diverge from the demeanour ideal, none has ever been held to disqualify the witness from giving his or her evidence on the grounds that the accused's fair trial rights would be compromised. He was of the opinion that wearing the *niqab* should not be treated any differently.

He further stated that as being unable to see a witness's entire face is only a partial interference with what is, in any event, only one part of an imprecise measuring tool of credibility, there is no reason to demand full 'demeanour access' where religious beliefs prevent it.[71] He pointed out that a witness may still express herself through her eyes, body language and gestures and that the *niqab* has no effect on the witness's verbal testimony, including the tone and inflection of her voice, the cadence of her speech, or most significantly, the substance of the answers she gives. The opportunity for full and proper cross-

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66 *Id* at par 91.

67 See from par 98 where he pointed to the pitfalls inherent in demeanour evidence.

68 *Id* at par 102.

69 *Id* at par 103.

70 See *id* paras 104 and 105 where he also pointed to other examples where a witness's evidence is accepted in terms of Canadian law without the trier of fact being able to assess demeanour at all.

71 See *id* from par 106.

examination also remains.[72]

He concluded by pointing out that a witness who was not permitted to wear a *niqab* while testifying, was being prevented from acting in accordance with her religious belief and that this has the effect of forcing her to choose between her religious beliefs and her ability to participate in the criminal justice system.[73] Complainants who sincerely believe that their religion requires them to wear the *niqab* in public, may choose not to bring charges for crimes against them, or may resist testifying in someone else's trial. Where the witness is the accused, she will be prevented further from bringing evidence in her own defence.

It is submitted that the majority's approach in *R v NS* unnecessarily complicates the issue concerned and that all cases will end up answering the fourth question suggested, namely, whether the salutary effects of requiring a witness to remove, for example, a face-veil, outweighs the deleterious effects of doing so? Phrased differently: is the denial of the accused's fair trial rights necessary to further an important public policy? The answer to this question will depend upon the importance of the public policy involved.

ANALYSIS

If a court has to decide whether a specific procedure that prevents an accused from having full access to all demeanour evidence is constitutionally sound, it will most likely have to perform a complex balancing test that will weigh the right to a fair trial against an important public policy. Such an inquiry will usually be triggered when a witness relies on another constitutional right to justify testifying in a manner that prevents full access to all possible demeanour evidence. If the procedure makes it possible to judge the reliability of the witness's evidence without having full access to demeanour evidence, an accused may be prevented from having full access to all demeanour evidence. In such a case, the witness could be allowed to wear a face-veil or even sunglasses, but the other elements of the right to adduce and challenge evidence must be present in order to ensure the general reliability of the evidence.

If a case is to be made out in favour of allowing a witness to testify with his or

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72 In this situation the witness's reaction to a question cannot, however, be fully observed.

73 *Id* from par 109.

her face covered because of religious reasons, for example, the first hurdle to overcome would be the fact that the principles underlying the right to adduce and challenge evidence are not a recent development in the law put in place to target a specific group of people. These principles are clearly neutral in that they evidence no discriminatory purpose but promote the right to a fair trial in general.[74] The principles further have general application and do not impact only on one group of people based on their conduct.[75] The second hurdle to clear would be to establish that there is a compelling government interest in allowing a specific group of witnesses to testify with their faces covered. A presumed assumption that such witnesses would not report cases for fear of the consequences of testifying, or would not testify in someone else's case, does not suffice. A proper investigative study will have to be conducted to confirm such assumptions.[76]

It is, perhaps, not simply a question of a cost-benefit analysis. In addition to the accused's right to a fair trial, there are other basic constitutional values that shift the balance towards having full access to all possible forms of demeanour evidence. South African criminal trials are adversarial in nature, and in a diverse society constitutional values such as openness and religious neutrality are paramount.[77] A system of open and independent courts is an essential component

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74 *Cf Prince v President, Cape Law Society* 2002 2 SA 794 (CC). See generally Woolman *et al* note 49 above at 41–44 *et seq*.

75 *Cf* the US Supreme Court's decision in *Emp't Div v Smith* 49 US 872 (1990) at 879 where the court notes that a person's right to free exercise of religion does not excuse him or her from complying with a valid and neutral law of general application on grounds that the law proscribes (or prescribes) conduct that such a person's religion prescribes (proscribes). Also see *Church of the Lukumi Babalu Aye, Inc v City of Hialeah* 508 US 520 (1993). For a general discussion of these cases, see Kaplan 'The devil is in the details: neutral, generally applicable laws and exceptions from *Smith*' (2000) 75 *NYULRev* 1045; Clerget note 48 above; Murray 'Confronting religion: veiled Muslim witnesses and the Confrontation Clause' (2010) 85 *NotreDameLRev* 1727.

76 It could in any event be a problem to establish that a specific practice is a central principle of the particular religion – *cf Christian Education SA v Minister of Education of the Government of the RSA* 1999 9 BCLR 951 (SE).

77 The fact that criminal proceedings must take place in an open court and in the presence of the accused is not only a principle of our common law, but codified in s 152 of the Criminal Procedure Act 51 of 1977. The Constitution of the Republic of South Africa, 1996 confirms this principle in s 35(3)(c) by stating that every accused person has the right to a fair trial, which includes the right 'to a public trial before an ordinary court'. Other constitutional provisions that are relevant here are s 1(d), which entrenches accountability, responsiveness and openness in democratic governance as founding values, and s 34, which entrenches a

of the rule of law and of a democratic state.[78] Viewed from this perspective, it is not likely that a court would allow a procedure that prevents full access to demeanour evidence, unless it is satisfied that an important public policy justifies such a procedure and that reliability of the evidence can otherwise be ensured.

CONCLUSION

The evidential value of demeanour evidence may not be beyond reproach, but because of the accused's right to a fair trial and other constitutional guarantees, such evidence will continue to be important when assessing the credibility of a witness. An established public policy may, however, limit access to demeanour evidence where the general reliability of the witness's evidence is otherwise ensured. Demeanour is only one of many factors that can indicate credibility.[79] Other factors include the probability of the witness's story, the consistency of his or her statements, and the interest he or she may have in the matter under enquiry.[80] In an instance where a conclusion from demeanour evidence could be

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fundamental right to access to the courts – see generally *Young v Minister of Safety and Security* 2005 2 SACR 437 (SE) par 13 *et seq* and the cases referred to by Plasket J.

78 See the remarks made by LeBel J and Rothstein J at n 55 above.

79 In *R v NS* n 8 above at 107. Abella J noted in a minority judgment that: 'It is clear … that trial fairness cannot reasonably expect ideal testimony from an ideal witness in every case, and that demeanour itself represents only one factor in the assessment of a witness's credibility. As Morden ACJO noted in *R v Levogiannis* (1990), 1 OR (3d) 351 (CA), the ideal is subject to several exceptions and qualifications in the interests of justice: "Accepting that [face-to-face confrontation] is a right, of a kind, I do not think that it can be said to be an absolute right, in itself, which reflects a basic tenet of our legal system. It is a right which is subject to qualification in the interests of justice. … The reason underlying the right is said to be that it is more difficult not to tell the truth about a person when looking at that person eye to eye … [B]ut … it is difficult to dogmatize about this – and in some cases … eye to eye contact may frustrate the obtaining of as true an account from the witness as is possible. This is why I think the right is more accurately considered to be one that is subject to exceptions or qualifications rather than a fundamental or absolute one. [367]"'.

80 In *Hees v Nel* 1994 1 PH F11 (T) at 32 Mohamed J notes with regard to assessing credibility: 'Included in the factors which a court would look at in examining the credibility or veracity of any witness, are matters such as the general quality of his testimony (which is often a relative condition to be compared with the quality of the evidence of the conflicting witnesses), his consistency both within the content and structure of his own evidence and with the objective facts, his integrity and candour, his age where this is relevant, his capacity and opportunities to be able to depose to the events he claims to have knowledge of, his personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability effectively to communicate what he intends to say, and the weight to be attached and the relevance of his version, against the background of the pleadings.'

controversial, there might also be something to be said for drawing the matter to the attention of the parties concerned to allow them to make submissions about it.[81] It would be best if a clear rule is stated as to whether a specific face-covering is acceptable or not when giving evidence. The issue should not be determined on a case-by-case basis.

[81] See *Newell v Cronje* 1985 4 SA 692 (E). It is in any event important that a trial court should record its impression of the demeanour of a material witness – see *S v Jochems* 1991 1 SACR 208 (A).