

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

IN THE MATTER OF Re: R.A. A JUROR

Before the Honourable Madame Justice Joan Charles

Appearances:

Mr. Christopher Hamel-Smith, S.C., instructed by Ms. Karlene Seenath and Ms. Mary Davis on behalf of the Attorney General

Mr. Fayard Hosein, S.C., Ms. Sophia Chote, Mr. Rishi Dass and Ms. Bridgemohansingh instructed by Mr. Al Wari on behalf of the Criminal Bar Association

Mr. Fareed Scoon appeared on behalf of the United Islamic League

Mr. Ravi Rajcoomar instructed by Ms. Dindial appeared on behalf of The Law Association

The History:

During the month of December 2007, one R.A., a female juror was a member of the panel of jurors assigned to the 3rd Criminal Court, Port of Spain. This juror indicated her willingness and availability to serve. She was not disqualified from service nor did she seek an exemption under the provisions of the Jury Act.

On the first day of the December Assizes when this juror attended Court with the other members of the panel, the Court's attention was directed to the form of her attire. R.A. wore a burqa, a form of dress worn by a certain sector of the Muslim community. She was covered from head to toe in a voluminous black robe; her entire head and face were covered save for a slit in the area of her eyes. R.A. was not selected to serve on that day. However, the Court requested that she remain after the other jurors had left for the day. Thereupon, the Court sought to conduct an inquiry of the juror relative to her form of dress, in the presence of State Counsel, Mrs. Latchoo and Ms. Dana Seetahal, Senior Counsel appearing *amicus*. The Court's initial concern was that the issue needed to be addressed since, in all probability, the juror may have been selected to serve during the course of that month if another matter was embarked upon, whereupon the issue of the juror's entire face being covered would have to be confronted.

R.A. was asked whether she would remove her headdress so that the Court and Counsel could see her face and the juror responded that whilst she had no difficulty showing her face to the Court or any female, she could not show her face to men. The Court then directed that she show her face to a female Marshall and Woman Police Constable for the purpose of her identification. The Court also invited submissions from Counsel on the adjourned date of 10th December 2007.

On 10th December 2007 the matter was called; R.A. was present as were Ms. Seetahal, Senior Counsel, appearing *amicus* and the Director of Public Prosecution, Mr. Henderson. The juror was asked by the Court whether she wanted to be personally involved in this matter and she declined. R.A. indicated to the Court that she is an Islamic Scholar, a graduate of the Dar Ul

Uloom and affiliated with the Masjid-ul-Muttageen of Munroe Road, Cunupia. She also stated that under the tenets of her belief, it was her choice as to whether she wore the hijab or the burqa but that she chose the latter. R.A. added that she would not remove her headdress in open Court.

On this date, the Court invited written arguments on the issue of whether a juror attired in the manner as R.A. was, should be allowed to sit on a jury. The Court sought assistance from Counsel in resolving this issue. During the hearing, an issue was raised as to the intervention of the Attorney General in the matter.

The D.P.P., Mr. Henderson, submitted that there was no matter to be grappled with by the Court having regard to the fact that there was no litigant before the Court alleging that his or her Constitutional Rights were being infringed.

On the 11th December 2007, Ms. Seetahal, Senior Counsel, appeared *amicus*; Mr. Hosein, Senior Counsel, appeared on behalf of the Criminal Bar Association; Mr. Rajcoomar and Mr. Persad on behalf of the Law Association; and Ms. Seenath, *amicus* on behalf of the Solicitor General. On this occasion, Mr. Hosein submitted that in order for this issue to be properly determined, evidence should be received on the issue of whether there was a religious obligation to wear a burqa. To this end, he stated that evidence may need to be taken from the juror herself on the issue. Ms. Seetahal, on the other hand, submitted that Notices be sent out to the various Islamic Organizations inviting their members to give evidence on the issue before the Court. The matter was then adjourned to the 18th January 2008.

On the 18th January 2008, the DPP, Mr. Henderson, appeared as well as Mr. Hamel-Smith, S.C. and Ms. Seenath, on behalf of the Attorney General. Mr Rajcoomar instructed by Ms. Dindial, appeared on behalf of the Law Association; and Mr. Hosein, S.C., Ms. Chote, Mr. Dass and Ms. Bridgemohansingh instructed by Mr. Wari on behalf of the Criminal Bar Association. The Court indicated to Counsel that on 17th January 2008, letters were sent to various Muslim organizations including the institute to which R.A. belonged, inviting comments on the issue before the Court. It was on this occasion that Mr. Hamel-Smith, appearing on behalf of the Attorney General raised the Preliminary Issue which the Court

sought to determine, namely, whether the Court had jurisdiction to hear and determine this issue; and, if the court had such jurisdiction whether it should exercise its discretion in favor of hearing and determining it.

On the 23rd April 2008, the Court ruled that it did in fact have jurisdiction to proceed and determine the matter. It was further stated by the Court that it was contemplated that, with the assistance of Counsel, the Court would issue guidelines with respect to any evidentiary issues which may have arisen.

Further to the ruling of the Court on 23rd April 2008, the following issue arose to be determined:

The Issue:

To what extent does the Court have the jurisdiction or authority to disqualify a person from being a juror for wearing a burqa, in addition to doing so on grounds specifically set out in the Jury Act Chap 6:53:

- a. Of its own motion; or
- b. Upon an application of the Parties; or
- c. Upon a challenge which is peremptory; or
- d. Upon a challenge which is for cause; or
- e. On any other basis

The Submissions:

The Importance of recognizing the plurality of modern societies:

Counsel on behalf of the Criminal Bar Association, Mr. Fyard Hosein, S.C., submitted that the importance of not simply recognizing but respecting and encouraging the fullest diversity of beliefs and customs in a modern society have been long standing objectives of modern societies and are now of self evident objective value.

Preliminary point relating to the belief of the Juror R.A.

Mr. Hosein went on to submit that in order for a religious belief to be protected it must be conscientiously held. This is a question of fact to be determined by the Court. If a belief is found not to be conscientiously held, then the difficulty is removed and no recourse to religious rights will be relevant. Once a belief is found to be conscientiously held however, the Court will not enquire into the legitimacy of any such belief, the state of said belief or the intensity of the person's belief against any proposed notional standard of orthodoxy.

He also argued that this issue may involve balancing several important but potentially competing rights and interests, including:

- i. The right to a fair trial, which itself is encompassed within the right of the individual to equality before the law and the protection of the law (section 4(b) of the Constitution).
- ii. The right to participate in the administration of justice as a juror.
- iii. The right as a juror to participate fully in the political, social and governmental affairs in the country.
- iv. The right to freedom of conscience and religious belief and observance (section 4(h) of the Constitution).
- v. The requirement that the judiciary is seen to be unbiased.

Furthermore, Counsel contended that due to the limited assistance provided by the case law, with respect to this matter, this issue will fall to be determined by means of reasoning and analogy from existing law.

Issue (a) – Disqualification by the Court of its Own Motion:

On the basis of dicta gleaned from case law and *section 19 (3) of the Jury Act*¹, it was submitted by all the parties that:

- i. The Court has the jurisdiction of its own motion, to disallow a juror from being sworn on grounds which are broader than those for disqualification set out at *section 5 of the Jury Act*,

¹ Chap 6:53

- ii. The Court must exercise this jurisdiction judicially and upon proper material; and
- iii. While the instances in which the Court should exercise this jurisdiction cannot (and should not) be defined, the test in each case is whether the circumstances are such that a fair trial cannot be had if the particular juror is allowed to become one of the members of jury to try the case.

Additionally, Counsel on behalf of the Attorney General, Mr. Christopher Hamel-Smith, S.C., contended that a court confronted with the issue at hand should ask itself whether the inclusion of that particular person as a juror in that particular case might lead to an unfair trial. In any case, the Court may have to consider the following matters:

- a. The need for jurors to be impartial; whether the person who is wearing a burqa may have views or opinions or experiences or affiliations to a community, which might make it difficult or impossible for her to be sufficiently impartial to serve as a juror in the particular case; and
- b. Concerns that might arise in any particular case as to the ways in which the inability to see the face (apart from the eyes) of a juror wearing a burqa might impact the fairness of the trial such as the fact that:
 - i. Counsel may not be able to read the juror's reactions denying him the opportunity to adjust the presentation of his or her client's case;
 - ii. Human nature being what it is, if the juror could be seen by the person whom the verdict affected she may be more cautious with her decision;
 - iii. It may be more difficult to determine whether the juror is paying attention, or even sleeping, than it would in the case of a juror whose face was not obscured; and
 - iv. It may be more difficult to identify the juror, leading to the possibility that another person may appear in her stead.

The Need to be Impartial

Section 23 A (1) (b) of the Jury Act expressly provides that a challenge may be made on the ground:

“that any juror is not indifferent between the State and the accused”.

It was submitted that, even absent a challenge, the Court has the inherent jurisdiction, of its own motion, to disallow a juror from being sworn if the circumstances are such that the Court can conclude from the material before it that the juror cannot be impartial. However, based on the importance of the principle that the jury should be selected at random and the important role that this plays in ensuring a fair trial, a Court should not conclude that a person will not be impartial simply on the basis that she is wearing a burqa or niqab without more.

Therefore, it was argued, if the Court holds that a person who is wearing a burqa is disqualified for this reason alone from serving as a juror on a case for which she has been selected, the selection of jurors would not be random as one significant section of the community would automatically be excluded. The framework of the Jury Act, which is typical of such legislation internationally, provides for an elaborate system of selection of potential jurors so as to achieve random selection.

Counsel submitted that any act to exclude a juror on the basis of her religious garb would infringe various constitutional and inherent rights of the juror, since the Court would be denying the juror the right to participate in the administration of justice as a juror, the right to freedom of conscience and religious belief and observance as guaranteed under ***section 4 (h) of the Constitution***², and the right as a juror to participate fully in the political, social and governmental affairs of the country. Thus, it was contended that any act of discrimination in the selection of juries offends not only the rights of the accused but that of the juror thus discriminated against. This reasoning flows from the recognition that the act of sitting on a jury is a form of democratic participation in public administration, reserved to all members of society regardless of religion. Such a decision might also negatively impact the requirement that the judiciary be seen to be unbiased.

It was argued by Counsel that a Court which concludes that, on the material properly before it, a juror who is wearing a burqa will not be sufficiently impartial, has the jurisdiction of its own motion to disqualify that person from serving as a juror in order to protect the fairness of the trial. In such circumstances, however, the Court does not disqualify the person from serving as a juror because she is wearing a burqa.

² Chap 1:01

Inability to see the full face of a juror

Counsel on behalf of the Attorney General submitted that the following are the main concerns that might arise if a juror's face cannot be seen by the Court and the Parties:

- i. Counsel may not be able to read the juror's reactions denying him the opportunity to adjust the presentation of his or her client's case;
- ii. Human nature being what it is, if the juror could be seen by the person whom the verdict affected she may be more cautious with her decision;
- iii. It may be more difficult to determine whether the juror is paying attention, or even sleeping, than it would in the case of a juror whose face was not obscured; and
- iv. It may be more difficult to identify the juror leading to the possibility that another person may appear in her stead.

Ability to read the juror's reactions

Mr. Hamel-Smith submitted that it is clear that the need to see a witness' full face during cross-examination is far more vital than seeing a juror's face. It was further argued that it is extremely unlikely that a situation will ever arise in which the impact of Counsel not being able to see a juror's full face (because she is wearing a burqa) would be so significant to his/her ability to present his or her client's case that it would lead to an unfair trial. Just as with witnesses, however, if the matter is raised by one of the Parties, the decision ought to be left to the trial judge as to whether or not the circumstances of that particular case are such that, exceptionally, allowing the juror to participate in the trial wearing a burqa would lead to an unfair trial.

If the juror could be seen by the person whom the verdict affected she would be more cautious with her decision

It was submitted that a fair trial is possible even where the accused is denied the right to look the witness in the eye. Accordingly, Counsel contended that a fair trial is perfectly possible with a juror whose full face cannot be seen because she is wearing a burqa. Such a juror will take an oath "*to try the issue between the State and the prisoner at the bar and a true verdict give according*

to the evidence”, and that there is no reason to believe that such a juror will not endeavour to do her best, or to be fair simply because the accused cannot see her full face.

Determining whether the juror is sleeping

It was argued on behalf of the Attorney General, that the possibility of a juror wearing a burqa falling asleep unnoticed is extremely remote. Firstly, the principal method of determining whether someone has fallen asleep is to see if their eyes are closed, and the burqa does in fact allow for viewing of its wearer’s eyes. Secondly, when a person falls asleep whilst in a sitting position, it is customary for their head to fall forward or backward or to the side, and this would still be noticeable even if someone were wearing a burqa. Counsel further contended that, in any event, a Court balancing the possibility of a juror wearing a burqa, falling asleep unnoticed and the importance of the other factors to be considered (especially her right to participate in the administration of justice as a juror, her right to freedom of religion, the requirement that the judiciary be seen to be unbiased and the right of the accused to be judged by a randomly selected cross-section of his peers), must decide the issue in favour of allowing the juror to remain on the panel.

Difficulty in identifying the juror

It was submitted that provisions could be made, in a number of ways, for a juror wearing a burqa to be identified, such as the juror showing her face to a female member of the court staff in private. Thus any increased difficulty in identifying a juror wearing a burqa will create no potential for an unfair trial. Counsel also stated that when one considers the importance of the other factors of the balancing equation (i.e. all the rights of both the juror and accused that may be infringed), any minor inconvenience caused in having to take additional steps to identify said juror cannot provide a good reason for disallowing a juror wearing a burqa from sitting on a jury.

In the circumstances, the following were agreed upon by all Counsel:

- i. Although the instances in which the Court should exercise its inherent jurisdiction to disallow a juror from sitting, cannot and should not be defined, a Court can only do so if it is satisfied that a fair trial cannot be had if a person wearing a burqa is allowed to sit as a member of the jury. A Court will only come to this conclusion

in very rare and exceptional circumstances. If necessary, any concerns arising out of the inability to see the juror's face should be dealt with by taking a variety of practical steps, as may be appropriate to mitigate such concerns, and not by disallowing the person from serving as a juror;

- ii. Even if a Court was confronted with such exceptional circumstances as may raise the question of whether a fair trial could be had, it will almost always be more appropriate for the Court to act upon the application of the Parties, rather than of its own motion;
- iii. If, in exceptional circumstances, a Court concludes that a fair trial cannot be had if a person wearing a burqa is allowed to become a member of the jury and that it must disqualify the person from being a juror in that particular case, the Court should allow the person to sit on another panel in order to maintain the appearance of impartiality of the judiciary and uphold the juror's right to partake in the administration of justice and her right to freedom of conscience and religious belief and observance.

Issue (b) – Disqualification upon an application of the Parties:

Mr. Hamel-Smith, S.C., argued that the Parties may apply to the Court to exercise its inherent jurisdiction, by drawing its attention to any circumstances which they believe would justify this.

Issue (c) – Disqualification upon a Challenge which is Peremptory:

Counsel for the Attorney General has submitted that in this case, a difficulty could arise, however, if the accused wants to see the juror's face to determine whether he will exercise his peremptory challenge. He submitted that while theoretically possible, this too is also a remote possibility. In any event, it was contended that in such a case an attempt should be made to resolve the situation whilst respecting the juror's right to her religious beliefs and the right of the accused to effectively exercise his peremptory right. For example, both the accused and the juror may be amenable to showing a photograph of the juror to the accused. In the event that the matter cannot be resolved, it was submitted that the Court may then consider exercising its inherent jurisdiction and remove the juror, allowing her to sit on another panel, unless it appears that the accused is abusing the process.

Issue (d) – Disqualification upon a Challenge which is for Cause:

In the case at bar, the issue arises as to the possibility of permitting a challenge for cause to a juror wearing a burqa. Counsel submitted that absent any exceptional circumstances, the fact of wearing a burqa itself ought not to ground a sufficient basis for challenge. The basis for challenge must find its provenance in section 23 A (1) and will most likely be *in relation to a juror not being indifferent*. To extrapolate from the mere fact of wearing a niqab a conclusion or realistic basis of challenge on the basis of impartiality in the absence of highly specific facts will be difficult if not impossible to reconcile with the presumption of impartiality.

The Advice delivered by the **Judicial Studies Board in the UK**³ is in a sense consonant with this approach when it notes that:

“...caution needs to be exercised, as in all such challenges, that there is a genuine and legitimate basis for such a challenge, based on the particular circumstances of the case”.

A difficulty could arise if the accused wants to see the juror’s face in order to determine whether to challenge for cause. This may occur, for example, if the accused believes that a particular person had a bias against him, but whilst he does not know the person’s name, he does know her face and as such would like to see the potential juror’s face to determine whether he needs to challenge for cause. Mr. Hamel-Smith argued, that as with peremptory challenges, an attempt should be made to resolve the situation whilst respecting all the competing rights, and that a possible solution may be to show a photograph of the juror to the accused (once the juror agrees). In the event the matter cannot be resolved, it was submitted that the Court may consider exercising its inherent jurisdiction and remove the juror, allowing her to sit on another panel.

Issue (e) – Disqualification on any other basis:

All counsel concurred on the point that no other basis could be found on which the Court may have jurisdiction to disqualify a person from being a juror for wearing a burqa.

³ Judicial Studies Board: Equal Treatment Bench Book, Chapter 3.3 (Religious Dress)

The Law:

As a starting point, the Court would like to point out that disputes in the courts regarding matters of faith have recently become increasingly prevalent, or at the very least, increasingly prominent. Issues relating to the wearing of Islamic headscarves or other forms of Islamic dress have attracted particular interest in the media and wider circles. In order for the courts, and indeed the legislature, to be able to perform the role of mediators effectively, society must have faith in its ability to so act. There must therefore be public confidence in and respect for, the Rule of Law.

The importance of recognizing the plurality of modern societies:

The Universal Declaration of Human Rights⁴, makes the point that all humans are free and equal in dignity and rights; everyone is entitled to rights and freedoms without distinction of any kind, such as, ...religion; everyone has the right to freedom of religion and this right includes the freedom to manifest one's religion or belief in teaching, practice, worship and observance (Articles 1, 2 and 18).

In the case of **Thomas v Baptiste**⁵, the majority of the Privy Council recognized the influence that international documents (such as the UN Declaration on Human Rights) had in respect of the common law rights enjoyed by citizens of Trinidad and Tobago prior to the enactment of the Constitution and upon the framers of the Constitution, as observed by Lord Millet at page 17, quoting from the case of ***de Freitas v Benny***⁶:

“...the fundamental rights and freedoms enshrined in the Constitution...are framed in light of the Universal Declaration of Human Rights 1948, and that like the previous Constitution, the 1976 Constitution proceeds on the assumption that the human rights and fundamental freedoms which it affirms and entrenches were already secured to the people of Trinidad and Tobago by the common law.”

⁴ G.A. Res. 217 A (III), U.N. Doc. A/810 (1948)

⁵ [2000] 2 A.C. 1

⁶ [1976] A.C. 239, 244

The constitutional basis for the recognition and protection of religious rights can be found domestically in ***section 4 of the Trinidad and Tobago Constitution***⁷, where it provides:

“It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:-

...

- h) freedom of conscience and religious belief and observance;
- i) freedom of thought and expression;

Subsequent to the enactment of its Republican Constitution, Trinidad and Tobago ratified the ***International Covenant on Civil and Political Rights***⁸, which provides:

Article 18:

No person shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice, and Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 27:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their own group, to enjoy their own culture, to profess and practice their own religion or to use their own language.

It is interesting to note at this point that ***Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms***⁹, parts 1 and 2, are in similar terms to the International Covenant on Civil and Political Rights, which has been ratified by Trinidad and Tobago. Both these international conventions provide protection for an absolute right to hold a belief and a qualified right to manifest a belief. When considering

⁷ Chap 1:01

⁸ G.A. Res. 2200 A (XXI), U.N. Doc. A/6316 (1966)

⁹ European Treaty Series – No. 5. Rome, 4. XI. 1950

whether there has been a violation of the qualified right to manifest one's belief, the following questions arise:

- a. Does the matter relate to a protected belief?
- b. If so, does the individual's act constitute a manifestation of that belief?
- c. Does the act complained of constitute a limitation on or interference with the individual's manifestation of his or her belief?
- d. If so, is that interference justified, in that:
 - i. it is prescribed by law?
 - ii. it is undertaken in pursuance of stipulated objectives?
 - iii. it is necessary for and proportionate in scope and effect to those objectives?
(per Lord Walker in **Regina v Secretary of State for Education and Employment and Ors., ex parte Williamson**¹⁰)

There can be no dispute that Islam, as one of the world's largest religions, is a protected belief, thus the Court must consider whether the wearing of the burqa is an act not merely motivated by the Islamic faith but intimately linked to and therefore a manifestation of the individual's belief.

In addition, the State (as a member of the Organization of American States) has adopted the ***American Convention on Human Rights*** which also provides that Member States are to respect the rights and freedoms of all persons and to ensure that persons are free to fully exercise their rights and freedoms (including the right to freedom of religion).

The significance of Trinidad and Tobago's ratification of the above international covenants is that it allows for the construction of the Constitution by the courts in a manner consistent with these covenants. This was expressly noted in the case of **Matadeen v Pointu**¹¹.

The particular importance of religious beliefs was noted by Lord Nicholls in **Regina v Secretary of State for Education and Employment and Ors, ex parte Williamson**¹²:

¹⁰ [2005] 2 All E.R. 1

¹¹ [1999] 1 A.C. 98 PC

¹² [2005] 2 All E.R. 1, at paragraph 15

“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilized society, individuals respect each other’s beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilized society. Unhappily, all too often this hallmark has been noticeable by its absence. Mutual tolerance has had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious and other intolerance.”

It is for individuals to freely self determine their belief system and the popularity or orthodoxy of any such belief is not a requisite to invoking the protection of the Court: per Lord Nicholls in ex parte Williamson, where he opines:

“...it is not for the court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual....Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.”

In the UK, the **Judicial Studies Board’s Equal Treatment Advisory Committee published an Equal Treatment Bench Book in December 2007¹³**, which provides guidance to assist judges in the United Kingdom, in treating with the issue of persons wearing religious dress in court. This Advice notes firstly the importance of the plurality of custom and the need to protect it and it advocates an unemotional, functional and pragmatic approach. According to the **Equal Treatment Bench Book¹⁴**:

A person’s religion or belief can influence the way they dress and present themselves in public. In most instances, clothing will present few, if any, issues for the judges...There is room for diversity, and there should be willingness to accommodate different practices and approaches to religious and cultural observance....The issue of religious dress is one that is most likely to arise in relation to the niqab or full veil, sometimes worn by Muslim women. As the niqab involves the full covering of the face, the judge may have to consider if any steps are required to ensure effective participation and a fair hearing, both for the woman wearing the niqab and other participants in the proceedings...While there are a

¹³ Judicial Studies Board: Equal Treatment Bench Book, Chapter 3.3 (Religious Dress)

¹⁴ *Id.* at page 3-18/1

range of different approaches, depending on the circumstances of the particular case and the individual concerned, the interests of justice remain paramount.

In essence, it is for the judge, in any set of circumstances, to consider what difference, if any, would be made to those interests by the niqab being worn...It is important to acknowledge that for Muslim women who do choose to wear the niqab, it is an important element of their religious and cultural identity. To force a choice between that identity (or cultural acceptability), and the woman's involvement in the criminal, civil justice, or tribunal system may well have a significant impact on that woman's sense of dignity and would likely serve to exclude and marginalize further women with limited visibility in courts and tribunals. This is of particular concern for a justice system that must be, and must be seen to be, inclusive and representative of the whole community.

The **Equal Treatment Bench Book**¹⁵ continues by looking at the different roles women may play in the judicial process and the effect of wearing a niqab/burka on those roles:

Essentially, any consideration concerning the wearing of the niqab should be functional; that is, on the basis that the niqab prevents a person from seeing a woman's face. The primary question that needs to be asked by any judicial office holder before coming to a decision is: What is the significance of seeing this woman's face to the judicial task that I have to fulfil? How does being capable of observing her facial expressions impact on the court's decision-making, given her particular role in the proceedings? A distinction can be made, therefore, between situations where this may be useful or important (for example, when assessing the evidence of a witness, particularly whose evidence is in dispute), situations where it is essential (for example, for purposes of identification), and other situations where it may not be of any relevance (for example, arguably, for court clerks or ushers)¹⁵.

In relation to Jurors specifically, the advice notes that:

"There may be circumstances where a judge has to hear a challenge for cause on the inclusion of a woman wearing the full veil as a member of a jury. The judge may feel the challenge justified and excuse her from serving on that jury, with the proviso that she may serve on another where no such challenge is made. Here, the decision must depend to a degree on the view of the parties to the particular case. But caution needs to be exercised, as in all such challenges, that there is a genuine and

¹⁵ *Id.* at page 3-18/2

legitimate basis for such a challenge, based on the particular circumstances of the case. There may well be situations in which such a juror would be welcomed by the parties, or one party at least, as having some insight which may be relevant to the task of the jury in the case¹⁶.”

Disqualification by the Court of its Own Motion:

As there is no express requirement in the Jury Act or any other law that the face of a juror be displayed, then any power to exclude must arise as part of the residual discretion of the Court.

It is clear that the Court has a residual discretion to remove or exclude an individual juror; this being implicit in the Jury Act itself in section 18 (4). One of the earliest confirmations and statements with respect to the Court’s inherent jurisdiction to disallow jurors of its own motion was made by Lord Campbell in **Mansell v The Queen**¹⁷. However, this residual discretion is to be exercised only in exceptional circumstances. In **R v Royston James Ford**¹⁸, Lord Lane CJ described the ambit of this power:

*“At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving on the jury. This is part of the judge’s duty to ensure that there is a fair trial. It is based on a duty of the judge expressed by Lord Campbell C.J. in **Mansell**, and he expressed it as a duty “to prevent scandal and perversion of justice.”...The basic proposition is that a juror may be discharged on grounds that would found a challenge for cause. In addition jurors who are not likely to be willing or able properly to perform their duties may also be discharged. Those grounds were set out in the judgment of Lord Campbell C.J., in **Mansell**, when he said:*

“If a juror is completely deaf or blind, or afflicted with bodily disease which rendered it impossible for him to continue in the jury-box without danger to his life, or were insane or drunk, or with his mind so occupied by the impending death of a near relative that he could not duly attend to the evidence.”

This speech made by Lord Lane CJ in **Ford** was subsequently quoted with approval by the Privy Council in **Ras Behari Lal and Ors. v The King Emperor**¹⁹. Furthermore, in the

¹⁶ *Id.* at page 3-18/3

¹⁷ (1857) 8 E & B 54

¹⁸ (1989) 89 Cr. App. R. 278 CA at 280

¹⁹ [1933] All E.R. 723

Australian case of **R v Searle**²⁰, the Supreme Court of Victoria held that the Court has an inherent jurisdiction to stand a juror aside of its own motion in order to ensure a fair trial, but that this jurisdiction must be exercised judicially and upon proper material. The Court quoted with approval the following passage from the New Zealand decision of **R v Greening**²¹:

“...there is in our opinion, an inherent jurisdiction by virtue of which the presiding Judge, if satisfied that justice requires that a particular juror should not be allowed to be sworn as a juror, may exclude him after he has been balloted, and is coming forward to take his place in the jury box....It is a power to be exercised judicially when the circumstances are such that a fair trial cannot be had if the particular juror is allowed to become one of the jury to try the case.”

It is noteworthy that this inherent power of the Court to prevent the perversion of justice by excluding where necessary a potential juror is broader than the grounds for disqualification set out at ***section 5 of the Jury Act***.

In the case of **Mason**²², Lawton LJ expanded somewhat Lord Campbell CJ's proposition in Manswell supra. He gave as an example of common judicial intervention, exclusion from the jury of a member of the panel who is infirm, has difficulty in hearing or one for whom taking part in a long trial would be unusually burdensome.

Section 19 (3) of The Jury Act,²³ also implicitly recognizes the duty of the Court, of its own motion, to disallow a juror from being sworn, if justice so requires, by providing that a juror may be “*discharged by the Court through illness or other sufficient cause*”.

The Need for the Jury to be Impartial

In **R v Sheffield Crown Court, ex parte Brownlow**²⁴, Lord Denning at pg 541 said as follows:

²⁰ [1993] 2 VR 367

²¹ [1957] NZLR 906

²² (1980) 71 Cr. App. R. 157

²³ Chap 6:53

²⁴ [1980] Q.B. 530

“Our philosophy is that the jury should be selected at random – from a panel of persons who are nominated at random. We believe that 12 persons selected at random are likely to be a cross section of the people as a whole – and thus represent the views of the common man...the parties must take them as they come.”

The object of provisions which seek to achieve random selection has been described by Sir Arthur Channel (in **Montreal Street Railway Co. v Normandin**²⁵), speaking on behalf of the Board of the Privy Council, in the following terms:

“As to the objects sought to be attained by these elaborate provisions for the mode of preparing the lists, there seem to be three (3) things aimed at: first, to distribute the burden of jury service equally between all liable to it; secondly, to secure for the use of the Courts effective lists of jurors likely to attend when called, the names of dead men and absent or exempted men being left out; thirdly, to prevent the selection of particular individuals for any jury, commonly called packing.”

In **R v Ford (Royston)**, Lord Lane CJ explained that:

“At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving on the jury. This is part of the judges’ duty to ensure a fair trial...It is important to stress, however, that that is to be exercised to prevent individuals who are not competent from serving. It has never been held to include a discretion to discharge competent jurors in an attempt to secure a jury drawn from a particular section of the community, or otherwise to influence the overall composition of the jury. For this latter purpose the law provides that “fairness” is achieved by the principle of random selection²⁶.”

In **R v Ford (Royston)**, the English Court of Appeal also warned that:

“It should also be remembered that the mere fact that a juror is, for instance, of a particular race or holds a particular religious belief cannot be made the basis for a challenge for cause on the grounds of bias or on any other grounds. If therefore a judge were to exercise his discretion to remove a juror on either of these grounds, he would be assuming bias where none was proved. Such a course is not only unjustified in law, but also indeed might be seriously derogatory of the particular juror.”²⁷

²⁵ [1917] A.C. 170

²⁶ (1989) 89 Cr. App. R. 278

²⁷ *Id.*

The impact of the inability to see the full face of a juror, on the fairness of the trial

Ability to read the juror's reactions

In the New Zealand case of **Police v Razamjoo**²⁸, as well as the English Court of Appeal case of **Doherty v Ministry of Defence**²⁹, it was clearly recognized and articulated that it is of crucial importance for cross-examining Counsel to be able to see the witness' face fully. Notwithstanding its importance, it was held that the decision as to whether to allow the witness' face to be hidden from Counsel should be made by the trial judge. In doing so, the Court tacitly acknowledged that in certain circumstances involving non-vital witnesses, their faces may be hidden even from Counsel who is cross-examining.

If the juror could be seen by the person whom the verdict affected they would be more cautious with their decision
In **R (on the application of D) v Camberwell Green Youth Court**³⁰, the House of Lords considered whether new legislation allowing child witnesses to give evidence by way of video link contravened Article 6 of the Human Rights Act which guarantees a fair trial. Lord Rodger of Earlsberry, acknowledged Counsel's proposition that the right to confront one's accusers was partly based on:

“a right of any defendant to be confronted with the witnesses against him and to look them in the eye while they are giving evidence. That right was valuable because, human nature being what it is, witnesses were likely to feel differently if they had to repeat their story looking at the man whom they would harm greatly by distorting or mistaking the facts.”

Despite this acknowledgment it was held that there was no absolute right to confrontation and a fair trial may be had if the witness was not in the accused's presence.

This position is supported by the case of **R v X,Y and Z**³¹. In that case the English Court of Appeal had to determine whether it was an unfair and prejudicial act to erect a screen allowing witnesses to testify without seeing or being seen by the Accused. The Court held:

²⁸ [2005] DCR 408

²⁹ 5th February, 1991 (unreported)

³⁰ [2005] UKHL 4

³¹ [1990] Crim L.R. 515

“...we do not need authority to confirm us in the view that what the learned judge here did in his discretion was a perfectly proper, and indeed a laudable attempt to see that this was a fair trial; fair to all, the accused, the Crown and indeed the witnesses.”

It is clear from these authorities that a trial judge, where the circumstances warrant, may deprive an accused of the right to confront his accuser once a fair trial for all can be achieved. In law, there is no such corresponding right for an accused to see the face of a juror. Nonetheless, for the reasons cited supra, a court may exercise its discretion in certain given circumstances to exclude a juror wearing a burqua from the jury in order to ensure a fair trial of an accused person.

Determining whether the juror is sleeping

If a juror has fallen asleep Counsel may bring this fact to the attention of the judge and ask that the Judge discharge the jury or individual juror. The judge will then consider whether this is an appropriate response. The case of **R v Tomar**³² illustrates this point.

Disqualification upon an application of the Parties:

In the case of **R v Searle**³³ the Judge exercised his inherent jurisdiction upon being informed by Counsel that one of the jurors was known to the solicitor of the accused. The Parties' right to make applications to the Court is in addition to the right to challenge.

Disqualification upon a Challenge which is Peremptory:

The right of peremptory challenge was discussed by **Barwick C.J. in Johns v R**³⁴, where he stated:

“The right of challenge, and particularly the right of peremptory challenge, lies at the very root of the jury system as it now exists. That the challenge is peremptory means that the accused need not in any wise justify his challenge. It need represent no more than his personal objection to be tried by the person whom he sees before him and whose name he has heard. No doubt, in deciding whether to exercise the right of challenge, an accused may profit by the views of counsel. But, even so, he may

³² [1997] Crim L.R. 682

³³ *Supra* at n. 21

³⁴ 25 A.L.R. 573

prefer his own instinctive reaction to the person he sees, to the experience of theories of the advocate. It is his peculiar right to follow his own impressions and inclinations.”

Section 23 of the Jury Act provides for both the Prosecution and the Defence to have a maximum of three (3) peremptory challenges. Although the use of these challenges is on its face unfettered, there may be circumstances in which its employment may result in breaches of fair trial procedures. The right given to prosecutors to peremptorily challenge jurors may not be utilized in a manner designed solely to discriminate against a particular section of society. This was held in the case of **Batson v Kentucky**³⁵, in which a defendant objected to the use by a prosecutor of peremptory challenges to strike off black jurors and achieve an all-white jury.

Disqualification upon a Challenge which is for Cause:

The right to challenge for cause is provided in **section 23 A of the Jury Act**. The Act is clear that only challenges upon the grounds provided in **section 23 A (1)** are permitted. Most of the grounds listed therein are matters of administrative formality save for the ground “*that any juror is not indifferent between the State and the accused.*” It is to be noted, that there is a presumption of impartiality in the duly selected jurors which comprise an array. In **R v Spence**³⁶, the Court in the course of its judgment stated:

“...criminal law is premised on the ability of 12 jurors to do their job with ‘indifference’ as between the Crown and the accused. We do not start with the idea that it is up to the potential juror to demonstrate his or her impartiality....people called for jury duty benefit from a presumption that they will do their duty without bias or partiality.”

Accordingly, before the challenge for cause can be permitted, the challenger must lay a foundation of fact as a pre-requisite to any cross examination of a potential juror. In Canada as well there is the need for a realistic basis, as pointed out in the case of **R v Spence**:

“The right to challenge for cause is not automatic. In each case, the trial judge must determine whether there is an air of reality to the challenge on the particular circumstances of each case.”

³⁵ *Supra* at n.17

³⁶ [2005] 3 S.C.R. 458 at paragraphs 21-22

Thus, the Court is permitted to control fishing expeditions on the part of Counsel in an attempt to secure more favourable juries.

In the context of a challenge for cause, the mere fact of wearing a niqab will ordinarily be insufficient to ground a *prima facie* case of partiality although this is a matter that will be fact sensitive and must be adjudicated upon a case by case basis within the discretion of the trial judge. It should be noted however, that this does not mean to say that no circumstances could ever arise in which the Court may have to consider whether a juror wearing a burqa has the required level of indifference. Thus, there may be exceptional circumstances where a particular juror who happens to wear a burqa may in fact not be ‘sufficiently indifferent between the State and the accused’. In those circumstances, whilst the Court would not have the discretion to exclude the juror on the basis that she is wearing a burqa, it would in fact have to discretion to exclude such a juror on the ground that she is not impartial.

With respect to concerns of national security, this will not by itself be sufficient to justify a blanket ruling, and furthermore security issues would be more appropriately classified as a matter for the administrative department of the judiciary, and they have nothing to do with the judicial exercise of a discretion as to who should sit on the jury or not from the point of view of ensuring a fair trial. In fact, any issue of security would precede the issue of the exercise of a judicial function to determine who may or may not sit on a jury. As a result, the Courts will demand that any assertion as to the demands of national security in an individual case be substantiated by evidence before the rights of individuals are permitted to be affected. As noted by Lord Scarman in the case of **Council of Civil Service Unions v Minister for the Civil Service**³⁷:

“My Lords, I conclude, therefore, that where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist; in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was

³⁷ [1984] 3 All E.R. 935 at 947-948

one which no reasonable minister advising the Crown could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is a commonsense limitation recognized by the judges as to what is justiciable; and the limitation is entirely consistent with the general development of the modern case law of judicial review.”

Disqualification on any other basis:

The Court agrees with the submissions of all Counsel on this issue and therefore holds that there is no other basis, other than those stated above, upon which a juror wearing a burqua can be disqualified.

The Principle of Proportionality

With respect to the submission advanced by Counsel that a determination of this matter would necessarily involve balancing several important but potentially competing rights and interests, the Court holds that the principle of proportionality requires that a reasonable relationship be maintained between the means employed and the ends to be achieved, so that a fair balance is struck between the rights of the community and the detriment that may be caused to an individual. It is also necessary to ensure that no other less intrusive means might have achieved the same result. (See the cases of **James v UK**³⁸ and **Sporrong and Lonnroth v Sweden**³⁹). One should also note at this stage the comments made by Lord Nicholls in **ex parte Williamson**⁴⁰:

“In a pluralist society a balance has to be struck between freedom to practice one’s own beliefs and the interests affected by those practices.”

³⁸ (1986) 8 EHRR 123 at para. 50

³⁹ (1983) 5 EHRR 35 at para. 69

⁴⁰ [2005] 2 All E.R. 1

Conclusion:

It is in this context that regard must be had to the ambit of any power which is to be exercised to disqualify persons outside of the statutorily defined exclusions. It is clear that the Court has no power to simply widen the categories of exclusion of persons qualified to serve as jurors, as to do so would be to exercise a legislative power, and to usurp the power of Parliament to determine the categories of eligibility. Parliament despite laying down exhaustive eligibility and exclusionary criteria has not seen it fit to impose a requirement or restriction relating to the wearing of a veil or the right to view the face of a juror. Accordingly, it is inconsistent with the Court's role of applying the will of Parliament for it to purport as a matter of policy to make a blanket ruling which would be tantamount to exercising a legislative role and amending the Act by adding an exclusion.

In the circumstances I therefore hold that the Court has no jurisdiction or authority, of its own motion or upon any other basis, to disqualify a person from serving as a juror on the sole basis that the individual is wearing a burqa.

Dated February 10th 2010.

Joan Charles

Judge