



Précis Paper

Religious dress in Court Proceedings

A discussion of the recent Victorian Supreme Court judgment in *The Queen v Chaarani* (Ruling 1) [2018] VSC 387.

Discussion Includes

- **Background**
- Arguments advanced on the wife's behalf
- History and precedents relied upon
- Decision in *Queen v Chaarani*
- **Future consequences of decision**

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1. In this edition of BenchTV, Nicholas Papas QC (Barrister) and Jay Cruikshank (AR Conolly and Company) discuss the recent Victorian Supreme Court judgment in *The Queen v Chaarani (Ruling 1)* [2018] VSC 387.

Background

2. The trial was a criminal trial involving three men charged with conspiracy to commit acts in preparation for terrorism activity. A preliminary argument was advanced by the wife of one of the accused, Mr Chaarani, that she wanted to be present in court to support her husband wearing her traditional Islamic dress, which was a full faced covering called a Niqab.
3. There was an application made in writing, in a detailed submission by counsel on behalf of Mr Chaarani to permit her presence in the public gallery in court.

Arguments advanced on the wife's behalf

4. It was submitted that Mr Chaarani's wife had a strong religious commitment to wearing her niqab in public. This was fundamental to the way she lived her faith. This was accepted by the judge.
5. It was also submitted that there is nothing disrespectful, offensive or threatening about wearing a niqab in court and the judge accepted this also.
6. Mr Chaarani's wife submitted that she wanted to be present to support her husband and that she would subject herself to the usual routine screening at the entrance to court.
7. She also noted that she was willing to remove her face covering for identification to security staff at this point.
8. She had been permitted to wear the face covering during the committal hearing in the magistrate's court and it was asserted that she was not a security risk.
9. There was also an argument advanced that the law provides an implicit acceptance of people observing and participating in court proceedings whilst wearing a niqab.
10. The final submission was that Australia is a multicultural society and religious dress should be accommodated unless overriding considerations prevailed to prevent that from happening.
11. By and large, the judge wasn't adverse to many of the fundamental principles of the submissions advanced by Mr Chaarani's wife and her willingness to show her face to the security staff as well as being screened for weapons, went some way towards addressing some of the security concerns that the judge had.
12. However, the judge made the point that it might not be only Mr Chaarani's wife who wanted to wear the full face covering and it was possible that there were others who were seeking to do that as well.

13. The judge felt that seating those wearing face coverings somewhere particular or having extra security would be an unnecessary use of court resources.
14. The judge also took the view that considerations in a magistrate's court, where there is no judge and jury, were different to the considerations that apply in the Supreme Court.
15. The judge gave weight to the fact that the charges were very serious and that there would be great stress and pressure associated with supporting an accused faced with such serious charges.
16. The judge spent time analysing the risks that persons supporting persons accused of these types of series offences might behave in a manner which might disrupt the court or possibly lead to jury discharge.

History and precedents relied upon

17. It was submitted on behalf of Mr Chaarani's wife that it is implicit in the case law that it is acceptable to observe or even participate in court proceedings whilst wearing a niqab.
18. However, the cases that counsel relied upon did not deal directly with the question of whether a supporter should be permitted to wear same in the public gallery of court proceedings.
19. In *Elzahed v State of New South Wales [2018] NSWCA 103*, the NSW Court of Appeal looked at the question of whether a primary judge in civil proceedings had erred in his decision to refuse to allow an appellant to give contested evidence whilst wearing a niqab
20. In this case, the trial judge considered that the niqab would impede the trial judge's ability to fully assess the appellant's credibility and reliability.
21. In the judgment the trial judge referred to the Australian National Imams Council (ANIC) Explanatory note on the Judicial Process and the Participation of Muslims which was prepared to specifically assist both Muslim people who are participating in court proceedings in the country as well as judges and lawyers.
22. The document sets out what the National Council of Imam suggests is appropriate and according to them, even though Muslim women typically wear a Hijab or full face covering, it is a sign of modesty and religious faith, and neither garment should present as an obstacle for women to participate in the courtroom process.
23. Specifically, the National Council of Imam states that it is not contrary to Sharia law for a woman to uncover her face when she is giving evidence in court.
24. The case of *Elzahed v State of New South Wales [2018] NSWCA 103*, dealt specifically at appellate level with a question of the judge's ability to control how a person is giving evidence.
25. However, it was different from what the judge was deciding in *Chaarani* as the decision in *Elzahed* dealt with the reliability and credibility of someone giving evidence in court.
26. The case of *NS v The Queen [2012] 3 S.C.R. 726* was another case looking at the permissibility of a person wearing a niqab in Court.
27. It was a Canadian Supreme Court decision which considered whether the judge had, in a preliminary examination in relation to sexual assault charges had wrongly refused permission to

the complainant to testify wearing a niqab. The complainant subsequently appealed, and this was dismissed.

28. In this case, the Court noted that there was no extreme approach to be taken in such matters and that it might be permissible in some cases, especially in cases where there was no controversy, for a witness to give evidence with a full face covering.
29. In *Police v Razamjoo [2005] DCR 408*, the accused was charged with making a false statement involving the theft of his car and a number of the witnesses wanted to wear niqabs.
30. In this case, the District Court judge ordered the witnesses to remove their niqabs whilst giving evidence however on account of concerns regarding modesty, he ordered a screen be erected in court so that only the judge, counsel and female court staff could see the witness
31. *R v D (unreported, Crown Court at Blackfriars, Judge Peter Murphy, 16 September 2013)*, was an English Crown Court case where an accused was charged with witness intimidation and wanted to wear a niqab during her trial. In this case the judge decided that her identity was not in question and that she could wear a niqab.
32. In *the Queen v Chaarani, Abdullah (Ruling 1) [2018] VSC 387* the judge noted that these precedents are all different from the question of whether a supporter in the public gallery should be permitted to wear face covering.
33. This is because in the above noted cases, those persons who have come into court under compulsion, either as witnesses or as the accused had no choice.
34. Therefore, the consideration of whether such persons wear a niqab was a matter for determination by the judge, whereas a supporter of an accused has the choice whether or not to attend court.

Decision in *Queen v Chaarani*

35. The judge accepted that Australia is a multicultural society and the judge found that religious dress should be accommodated.
36. However, the judge noted that the right to religious freedom and the right to participate in public life are not absolutes and the Charter of Human Rights confirms that particular rights, such as religious freedom and the right to dress in accordance with religious beliefs, is subject to limitations.
37. This is confirmed by chapter 7 of the *Human Rights and Responsibilities Act 2006 (VIC)* which stipulates that such rights may be limited where the limitations can be demonstrably justified in a free and democratic society based on human dignity, quality and freedom.
38. The Judge in Chaarani took the view that there was a real risk to the trial that might be occasioned by the inability to identify persons in the public gallery .
39. This was because the particular stresses of the severity of the nature of the offences meant that it was necessary for those who might disrupt the trial to be identified.
40. His Honour noted that if persons are uncovered in court, then CCTV and court recording equipment would permit the identification of a person who might misbehave and further, His Honour felt that if there was more than one person wearing the niqabs, the risk might be amplified.

41. The judge noted that it was not good court practice management to adopt a reactive approach, that is to allow spectators to have their faces covered but deny them re-entry if they are detected misbehaving.
42. There was no suggestion that the female relatives of any of the accused had misbehaved in any sense and his decision was an anticipatory approach, not a reactive approach.
43. The judge determined that a proper balance was to permit those who chose not to reveal their faces to sit in a particular room with live streaming of the case via court recording microphones and video so that they could follow the trial.
44. This meant that special arrangements with special resourcing was provided for a category of person who had been prevented from coming to court in anticipation that they may cause disruption.

Future consequences of the decision

45. The idea that someone cannot come into court to support their relative is not a prohibited action.
46. Whilst the Judge in *Chaarani* ruled that there should not be people coming into court with their faces covered, other judges in future cases will turn their minds to the facts of the particular case and make their decision accordingly.
47. The Judge in *Chaarani* noted that he considered it to be a reasonable limitation demonstrably justified in a free and democratic society based on human equality, dignity and freedom to require spectators in the public gallery to have their faces uncovered in the context of the facts of this case.

BIOGRAPHY

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Nicholas Papas is a former Victorian Chief Magistrate, Crown Prosecutor and General Manager of Victoria Legal Aid Criminal Law Division with experience in both appellate advocacy and criminal trials. He was Court Advisor to the Australian Government in the Solomon Islands and has also worked as a radio broadcaster. He holds an Indictable Crime Certificate

BIBLIOGRAPHY

Focus Case

The Queen v Chaarani (Ruling 1) [2018] VSC 387.

Cases

Elzahed v State of New South Wales [2018] NSWCA 103

NS v The Queen [2012] 3 S.C.R. 72

Police v Razamjoo [2005] DCR 408

R v D (unreported, Crown Court at Blackfriars, Judge Peter Murphy, 16 September 2013)

Legislation

Human Rights and Responsibilities Act 2006 (VIC)