

**AN ANALYSIS OF THE ADMISSIBILITY OF CIRCUMSTANTIAL
EVIDENCE IN ZINA CASES IN ISLAMIC LAW**

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Abstract

In recent times, most Qadis, lawyers, sharia students and the public at large accept that the offence of Zina can only be established through testimonies [Shahadah], confession [Iqrar] or an act of imprecation [Li'an], while circumstantial evidence [Qarinah] is not employed even if these mentioned above failed. In addressing the issue of Qarinah in Islamic law of evidence particularly in Zina cases, Muslim jurists have different opinions regarding its applicability, in this case Whether Qarinah could be used as a strong prove which could attain the degree of certainty [Yaqin] that could warrant hadd punishment? Secondly, whether pregnancy of an unmarried girl is accepted as a form of Qarinah in Zina cases? Thirdly, whether a woman who has never been married could be presumed to commit Zina when pregnancy proved to have occurred? After discussing all these issues raised, alongside the meaning, textual foundation, and the applicability or otherwise of Qarinah, the paper will end with conclusions and recommendations.

1:1 INTRODUCTION

Sharia aims to prevent crime, ward off evil, uproot and eliminate corruption, indecency and injustice in the world. It has unambiguously defined every crime that may be committed. It has determined and fixed their nature, type, method and how evidence should be administered. It has also defined and categorised evidence and determined its admissibility or otherwise, it laid down the means as well as instrument and medium of proof. This is informed by the dictum that punishment before substantial evidence is not only an act of injustice and transgression but also irreverence to Almighty Allah.

When the guilt or innocence of an accused person in a case of *Zina* cannot be established through the testimony of witnesses (*Shahadah*), confession by the offender (*Iqrar*), or an act of imprecation (*Li'an*). But indication exist as to the probability of the commission of the offence is most likely, (i.e. through pregnancy of a woman who has never been married), then there is the need to resort to circumstantial evidence (*Qarinah*) to ascertain the truth. Circumstantial evidence is not direct evidence from a witness who sees or hears something, it is a fact that can be used to infer another truth, it is an indirect evidence that implies something occurred but does not directly prove it.

1:2 MEANING OF CIRCUMSTANTIAL EVIDENCE (*QARINAH*) IN ISLAMIC LAW.

The word *Qarinah* originated from an Arabic word “*Qa-ra-na*” meaning one or more incidents which has or has not taken place in a way that makes it possible to determine with certainty that an event or events has or has not occurred, it is an impact or sign which create the status of certitude that certain incident(s) did or did not occur.¹ Abdul Karim Zaidan in his work “*Nizamul Qadai*” illustrates circumstantial evidence as follows;

*A man in a state of fear, anxiety, aggression and astonishment rushed out of a house with a knife stained with blood, on getting to the house from where he rushed out, a murdered person was found and there was no indication that the deceased committed suicide.*²

It is the consensus of all the jurist who accept *Qarinah* that, it shall not be used unless it is conclusive, thus the challenge of the Sharia Courts is the determination of conclusiveness or otherwise of the circumstantial evidence materials before it.³

Circumstantial evidence under the common law is evidence based on inference and not on personal knowledge or observation; it is sometimes referred to as indirect evidence. Circumstantial evidence is that which applied to the principal fact indirectly or through a medium of other facts already described as evidentiary from which the principal fact is extracted and gathered by a process of special inference.⁴

In his forward to the book *Circumstantial Evidence in Nigeria*, Niki Tobi opined that:

*“Before an accused person is convicted on circumstantial evidence it must be cogent, compelling, overwhelming and unequivocal for fear that the courts do not commit persons for murder and other offences on mere suspicion.”*⁵

While justice Nnamani, (JSC) as cited by Okekefere defined circumstantial evidence as evidence of surrounding circumstances which by undersigned coincidence, is capable of proving a preposition with the accuracy of mathematics.⁶

Under Islamic law, though circumstantial evidence is used in some case however, it is a guide for further investigations. According to Oudah, in most of the cases circumstantial evidence does not provide positive proof if it is not supported by textual injunction, it is therefore rather ambiguous and doubtful but used with cautions.⁷

Circumstantial evidence is evidence based upon inference, conditional and conjunctional to the situation, contingent upon deductions of the pieces of elements necessary to establish the case. It is founded upon implicational, incidental, insinuatory and probable circumstances, this requires particular aptitude and disposition to investigate and scrutinize based upon human psychology. It is not an

¹ Ambali M A, *The Practice of Muslim Family Law in Nigeria* (Tamaza Publishing Company, Zaria, Kaduna, 1997) p.128.

² Zaidan AK, *Nizamul Qadai*, (Al-Aany printing press, Bagdad, 1984) p.219.

³ Qadri AA, *Islamic Jurisprudence in the Modern world*, (Taj Company, 1986) p507.

⁴ Garner B A, *Black's Law Dictionary*, 8th ed. (West Group Publication, USA, 2004) p576.

⁵ Tobi N, *Law of Evidence in Nigeria* “(2002) in the forward of the book, available at <http://www.pub.umich.edu/daily/1997/06-04-97/news-news3.html>. accessed on

⁶ Okefere A.L, *Circumstantial Evidence in Nigerian Law*” (Law House Books, Port-Harcourt, 2000) P. 22.

⁷ Oudah A.Q, *Criminal Law of Islam*, Vol. 4 (International Islamic Publication, New Delhi, India, 2000) pp 405.406.

appropriate method of proof but in the absence of testimony of witnesses, confession by the offender and administration of oath, it may be resorted to with caution and tactics.⁸

Circumstantial evidence under both Islamic law and common law are unrelated facts that, when considered together, can be used to infer a conclusion about something unknown. It is usually a theory supported by a significant quantity of corroborating evidence.⁹

1:3 ORIGIN OF CIRCUMSTANTIAL EVIDENCE IN ISLAMIC LAW.

The textual foundation of circumstantial evidence could be traced to the parable of Prophet Yusuf *Alaihis'salam* (Joseph) and Zulaikha'u, where the holy Qur'an provides that:

"He Yusuf said: it was she that sought to seduce me, and a witness of her household bore witness saying: if it be that his shirt is torn from the front, then her tale is true and he is a liar! But if it be that his shirt is torn from the back, then she has told a lie and he is speaking the truth! So when her husband saw his shirt torn at the back, her husband said: surely it is a plot of you women, certainly mighty is your plot! O Yusuf turn away from this! O woman ask forgiveness for your sin. Verily you were of the sinful¹⁰

Here, circumstantial evidence enabled and freed Prophet *Yusuf Alaihis'salam* (Joseph) of the accusation. It is therefore not used for the establishment of crime or guilt but innocence of the suspect. Therefore, suspect can be freed from the strength of circumstantial evidence.

It is important to mention also, the parable of Sulaiman and Dawud in which two women claimed to be the legitimate mother of a child, they left their children at the same place but one of the children was eaten up by a Wolf both the women laid claim to the surviving child. Dawud ordered the child to be given to the elder woman. While Sulaiman retried the case and ordered for a knife and said to the women that he would rip up the child into two and give each half. the older woman rushed to bring the knife while the younger one plead to keep the child alive and agreed that the child be given to the older woman so that the child will remain alive, Sulaiman ruled that the act of rushing to bring the knife indicated that the elder woman was not the real mother of the surviving child while the younger woman's act of pleading for the child to remain alive even not with her, indicated strongly that the child's real mother is the younger lady, and the child was therefore given to the younger lady based upon circumstantial evidence.¹¹

Based upon circumstantial evidence there are some cases in the sharia which could be determined i.e. pregnancy of an unmarried virgin. The crime of *Zina* can be established with the pregnancy of an unmarried virgin provided there is no plea of rape. When should the plea made and how it could be accepted? Usually for the shame associated with rape, victims do not easily confessed or lodge complain of rape

⁸ Mustapha A. 'The Status, Grounds and General Principles Governing the Admission or Otherwise of Circumstantial, Forensic and Firasha Evidence in the Sharia'. In a paper presented at the 9th Annual Judges forum's Conference, at Congo conference centre, Ahmadu Bello University Zaria from 24th – 26th October (2007) pp 12-13.

⁹ Ibid. P11.

¹⁰ Holy Quran 12:26-29.

¹¹ Mohammad S S. *Stories of the Holy Quran*, (Labanon, Dar-al Kotob Al-Ilmiyyah, 2006) pp 238-240.

until when that rape leads to pregnancy. Also the rapist hide behind the requirements of the law of four witnesses before the allegation of rape is established. For this reason therefore at any stage the excuse of rape may be admissible as a defence against *Zina*. As it is difficult to proof, it is easy to accept as a defence.¹²

1:4 ADMISSIBILITY OF CIRCUMSTANTIAL EVIDENCE IN ZINA CASES.

The holy Qur'an has in no way bound us to adopt a particular method to prove a crime; a crime stands proven in Islamic law just as its stands proven in accordance with universally accepted legal methods endorsed by sense and reason. Consequently, if circumstantial Evidence, medical check-ups, finger prints, testimony of witnesses, confession of criminal, oaths or any other method is applied to ascertain a crime it is acceptable to the Islamic law. However there are two exceptions to this general principle:

1. If a person accuses a chaste and righteous man or woman having a sound moral reputation of fornication, the holy Qur'an insist that the accuser shall have to produce four eye-witnesses; to this end the holy Qur'an said:

Those who accuse honourable woman and bring not four witness as an evidence [for their accusation], inflict eighty stripes upon them, and never accept their testimonies in future they indeed are transgressors. But those who repent and mend their ways, Allah is oft-forgiving and most-merciful¹³

Circumstantial evidence or medical reports in this case are of no important. If a person is of a lewd character such things are of importance, but if he has a morally sound reputation, Islam wants that even if he has fettered, his crime should be concealed and he should not be disgraced in the society.

2. To purge an Islamic state of prostitutes, who in spite of being Muslims, do not give up their life of sin, the only thing required, according to the holy Qur'an, is that four witnesses should be called forth who are in a position to testify that they are prostitutes: to this end the holy Qur'an providers that.

And upon those of your women who habitually commit fornication call in four people among yourselves to testify over them; if they testify [to their ill-ways], confine them to their homes till death overtakes them or God finds another way for them. And the man and women among you who commit fornication, punish them. If they repent and mend their ways, leave them alone for God is oft-forgiving and most merciful.¹⁴

Another point to be noted is that the almighty Allah does not like that a criminal confess his crime himself or that those who are aware of his crime report this matter to the authorities, this is evident from the wording of the law of wrongly accusing someone of fornication stated in the holy Quran [24:4] And also the holy Prophet (SAW) is also reported to have said.

¹² Mustapha A, Op-cit, p14.

¹³ Holy Quran 24:4.

¹⁴ Holy Quran 4:15-16.

“He among you who gets involved in such fitth should hide behind the veil stretched out for him by Allah, but if he unfolds the veil, we shall implement the law of Allah upon him.”¹⁵

Similarly the holy Prophet (SAW) once told a person

“If you had hidden the crime of this person it would have been better for you.”¹⁶

Admittedly, there is a clear Qur’anic injunction which prescribed the punishment of flogging with 100 stripes for a fornicator who is unmarried (*Ghair Al Muhsan*).to this end the holy Qur’an provides that:

“The woman and the man guilty of adultery or fornication, flog each of them with hundred stripes. Let no compassion move you in their case, in a matter prescribed by God, if you believe in God and in the Last Day: and let a party of the Believers witness their punishment.”¹⁷

Meanwhile, the punishment of stoning for married person is based on the authority of the holy Prophet. It is reported on the authority of Ibn Masu’ud that the Prophet (SAW) said:

The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am His messenger may not be legally spilt except that in one of three (instances): a married person who commits adultery; a life for a life; and one who forsakes his religion and abandons the community.”¹⁸

Jurists are unanimous in that *Zina* cases can be proved though *Iqrar* (confession), *Shahadah* (testimony) of four male witnesses, or *Li’an* an act of imprecation. This is related to the act which referred to the act of penetration of man's organ into the woman's organ. This can only be proved by the confession of the criminal or seen by witnesses or through *Li’an*. However the dispute arises on the position of unmarried woman where she is pregnant without marriage. It is understood that pregnancy is related to the act of sexual intercourse and it is only recognized when she is a married person. Further question arises is that, whether in discussing the role of *Qarinah* in *Zina* cases, such pregnancy can be used as evidence to implicate and charge the accused for the offence of *Zina* or not?

It should be noted that there are two circumstances in which *Qarinah* of Pregnancy could act against a woman.

First, where she is impossible by law to bear a child as in the case of unmarried woman and Secondly, where she is as a matter of fact incapable of bearing a child as her husband is a minor but in each case she is proved to be pregnant. Therefore, the adverse inference against her is that she has committed illegal sexual intercourse.¹⁹

There are two views regarding this matter. The first view held by the Malikis, some of the Hambalis, Ibn- Taimiyyah and Ibn-Qayyim thought that when pregnancy is proved to have occurred, she is presumed to have committed *Zina*. Therefore, if she

¹⁵ Malik A, *Muwatta Imam Malik*, A Translation of Aisha Abdurahman al Tarjumana and Ya’qub Johnson, (Diwan press, Cambridge, 1982)

¹⁶ Ibid.

¹⁷ The Holy Qur’an: 24:2.

¹⁸ Al-Bukhari M, *Sahih al-Bukhari*, English Translation of M.M.Khan, 5th ed, (Kazi Publications, New Delhi,1984,vol. 9), pp10-11.

¹⁹ Ramlee Z, *The Role of al-Qarinah (Circumstantial Evidence) In Islamic Law of Evidence: A Study of The Law in Malaysia, With Reference To The Rules and Principles of English Law*, (1997), pp. 86.

could not bring a valid excuse, *hadd* punishment could be imposed against her. Their arguments are based on the practices of the Companions of the holy Prophet Muhammad (SAW).

1) It was reported by Ibn-Abbas that: Umar Ibn Khattab had delivered a speech while standing on the pulpit in front of the other Companions. Some parts of his speech are as follows:

Indeed, the punishment of stoning in the Book of Allah is a right which is deserved by a married person either male or female. If it is proved by shahadah (testimony) or al-haml(pregnancy) or by the way of al-iqrar (confession).²⁰

It is clear that the statement of Umar Ibn Khattab is relating to the imposing of *hadd* punishment for an adulterer if it was proved by either testimony or confession or in a case of an unmarried woman by her becoming pregnant.

2) A similar statement is considered as a second authority also mentioned by Ali Ibn Abi Talib who once said:

'Actually there are two types of adultery; a hidden adultery and an apparent adultery. With regard to the hidden adultery it must be proved by eye-witnesses and these witnesses must be the first person who throw the stone, then follow by the Imam and then by the rest of the people. And what is meant by apparent adultery is when pregnancy is obvious or by way of confession. And the Imam will be the first person to cast a stone'.²¹

Therefore, from the first view, it seems that the validity of the use of pregnancy as a proof of committing adultery is unobjectionable. The pregnancy might not be due to the lawful marriage and it might be caused by an unlawful relationship.

Imam Malik on the other hand thought that *hadd* punishment could be imposed if the woman was not resident in the jurisdiction and she was not known to the citizen of the jurisdiction unless there are signs that she was forced against her will, example, she was heard screaming or crying for help. In his own words Imam Malik said in Al-Muwatta':

"The position with us about a woman who is found to be pregnant and has no husband and she says: 'I was forced' or she says: 'I am married', is that it is not to be accepted and the hadd will be inflicted on her unless she has a clear proof on what she claimed about the marriage or evidence that she was forced or evidence of bleeding if she was a virgin or evidence of calling for help from someone who saw her in that state or the situation in which the violation occurred. If she does not produce any of those, the hadd will be inflicted on her and what she claims will not be accepted'.²²

In dealing with the above situation, It can be further elaborate that it may be a case that such pregnancy may be caused without her consent for example if she has been raped or even with her consent but without sexual intercourse, as happen in surrogacy cases. This situation might happen but it can only be argued or counterclaimed by the

²⁰ Al-Bukhari M, *Sahih al-Bukhari*, English Translation of M.M.Khan, 5th ed, (Kazi Publications, New Delhi, 1984, vol. 9), pp539-540.

²¹ Ibn Qudamah, *Al-Mughni*, Vol. 10 (Bierut, Lubnan, Dar- al Kutub Ilmiyyah, undated) p. 193.

²² Malik A, *Muwatta Imam Malik*, A translation of A Al Tarjumana and Y Johnson, (Diwan press, Cambridge, 1982)Pp. 392.

accused when dealing with defences only. The onus of proof that she has been raped or caused by the other factors is on her. She will not be sentenced immediately, until she has been given a right of defence. It should be noted that although some jurists strongly agreed that pregnancy is a form of *Qarinah* in adultery cases, one must bear in mind that this *Qarinah* is not a direct evidence to punish the woman for the *hadd* but is in fact only a kind of presumption, Since *Qarinah* is a rebuttable presumption, that the accused can rebut this presumption at the defence stage. In other words, pregnancy is not a ticket for a conviction²³.

The second view: According to majority of Jurists, including **Abu Hanifah, Al-Shafi'i** and **Ahmad Ibn-Hanbal** ruled that the *hadd* punishment should not be applied in such a case. The mere fact that a woman is pregnant could not be used to warrant a conviction. Therefore *hadd* punishment could not be imposed against an unmarried pregnant woman regardless whether she is local resident who is known to the public or an outsider. The basis of their argument was based on practices of Companion of the holy Prophet.

1) The first incident was reported by al-Nazail ibn Sabrah, he said:

*'We were at Mecca when there were many people surrounding a woman, and it seems that they might kill her. They shouted: 'she committed adultery', she committed adultery'. Then 'Umar Ibn al-Khattab came out and said: 'Tell me what has happened to you'. She said: 'Oh Commander of the Believers, I used to pray during the night. One night, I performed the night prayer and then fell to sleep but when I woke up there was a man in between my legs, he did it very fast, then he went away. Umar said: 'If this woman were killed by all the people of Mecca, God would have tortured them all. Go, you are free.'*²⁴

On the basis of the above authority, it was added by *Ibn Qudamah*, a prominent jurist from the Hanbali school that *hadd* punishment would not be inflicted merely because an unmarried woman was found to be pregnant. This may be a sexual intercourse made under duress or may be due to a rape or by mistake. According to Al-Mughni, a woman may nevertheless become pregnant without having sexual intercourse, such as in the case if somehow a man's seminal fluid could get into her womb either through her own device or through someone else's act. In such a case, it is therefore possible for a virgin to become pregnant²⁵.

2) In another Hadith it was reported by Al-Bara' ibn Sibrāh: that a pregnant woman who came to see 'Umar Ibn Al-Khattab and claimed that she had been raped. On hearing this 'Umar released her and wrote to all commanders of the army that they should not kill anybody (in implementing *hadd*) without his consent.

Therefore, from the above two authorities it shows that the practice of 'Umar in discharging the pregnant woman from punishment was used by those who are holding the view that the *Qarinah* of pregnancy could not be used as evidence of committing adultery.

²³ Samori, Z.B, 'Qarinah (Circumstantial Evidence) in Adultery (Zina) Case: Analysis on Four Madhab and Provision in Malaysia and Pakistan' (undated). Page7. Available at <http://www.shahalam.com>. Accessed on 13th/ 09/2011.

²⁴ Ibn Qudamah, *Al-Mughni*, Op. cit. P. 159.

²⁵ Ibid.

By taking into consideration of the opinion given by the second view, it is clear that a woman who becomes pregnant without a husband either through coercion or a woman who seems to be pregnant will not automatically be subjected to *hadd* punishment. Therefore, if a pregnant woman is virgin who could prove her virginity then such an ambiguity will also not attract the *hadd*. What is clear is that *hadd* punishment can only be imposed when there is no doubt at all. To accuse a woman of committing adultery by the mere fact that she is pregnant, is therefore unjustified and creates doubt (*shubha*). Thus, relying on the hadith of the Prophet (SAW) which state:

'Set aside hudud punishment in the existence of doubt

1:4:1 BURDEN OF PROOF:

In this regard, we have to take into consideration the nature of pregnancy in the life of a woman. The natural process of pregnancy in the life of a woman is that having sexual intercourse with her husband. Otherwise, such pregnancy is not a valid pregnancy. If a person is married and at the same time (based on pregnancy) she was accused of committing *Zina*, the responsibility to prove the case against the accused lies on the prosecution. In other words, the burden of proof lies on the prosecution. Adversely, pregnancy without marriage is an irregular process and out of the general understanding and the acceptance of the people. Admittedly, there are so many possibilities why is so happen, and since it is an exceptional in nature, the exceptional procedure must be dealt with. On the part of the accused, she has a right to defend herself since the nature is obviously contrary to the general practice. She is responsible to explain but this right must be administered properly since there is possibility of other element influences her.²⁶

This is in line with the principle of shifting burden. It was clearly mentioned that if there is a claim, the general rule is that he should provide evidence in support of his allegation. The maxim states that

"A person is presumed to be innocent unless proven otherwise"

However, there is a question as to whether this general principle will be subjected to certain exception. To answer this we have to further understand the related maxim:

"The purpose of evidence is to prove what is contrary to the apparent fact. The purpose of the oath is to ensure the continuation of the original state."²⁷

This maxim means, any person who makes a claim contrary to the apparent fact should bring a proof to substantiate his allegation due to what he claims is not in line with the original state. Thus, if someone accuses a woman for committing *Zina*, he/she must prove his/her allegation is contrary to the apparent fact because that woman is presumed to have done nothing wrong. However, the situation would be different if someone accuses an unmarried woman for committing *Zina* due to pregnancy. Here, the claimants' allegation is not contrary to the apparent fact but it is in line with the apparent fact. Therefore, in analyzing the above situation, the principle of shifting the burden of proof seems to be the best solution in dealing with the second situation. The burden of proof will shift to the woman alleged to have committed *Zina* base on pregnancy. She has to prove her virginity or the cause that lead to her pregnancy. For instance if she denies committing *Zina* on the ground of duress, the burden of proof is on her to prove that she was under that state²⁸.

²⁶ Hamid J, *Islamic Law of Evidence: Sources & Its Applicability with Special Reference to the Practices in Malaysia & Pakistan*, 2006, pp. 28-29 Available at <http://www>.

²⁷ The Majelle, Article 77

²⁸ Samori, Z.B, Op-cit footnote 23

The relevant and the best authority emphasized to the above principle of shifting the burden was provided in the Holy Qur'an. Surah Maryam 19:27-34, Where Maryam was pregnant without a husband was accused of committing *Zina* by her people. They were right in accusing Maryam because she was in the state contradicting with the original presumption. However, Maryam was able to prove that:

- 1) By the *Qarinah* of her good behaviour that was well known to her people.
- And.
- 2) By the miracle event that the baby himself told the truth of the matter to the people.

1:4:2 STANDARD OF PROOF REQUIRED.

Another important point to be emphasized is that, a charge cannot be simply accepted unless the evidence reaches the degree of certainty, particularly in *hudud* cases. This case involved the right of every individual. Therefore, this is very clear when we refer to the hadith of the Prophet (SAW) where he was reported to have told Ali, who had been appointed as governor of Yaman:

*"O Ali! People will come to you asking for judgments. When the two parties to a dispute come to you, do not decide in favour of either party until you have heard all that both parties have to say. On this manner will you come to a proper decision, and only in this way will you come to know the truth".*²⁹

Therefore, as we have understood that the *hadd* punishment can only be imposed when the proof reaches the level of certainty (*Yaqin*). A question arises on the nature of proof to be given by the accused in defending herself. At the defence stage, if the accused is able to create suspicion or doubt to the probabilities (*Zann*), it is enough to release or acquitted from warrant of conviction and punishment.³⁰

How do we reconcile the above two opinions of jurists? Basically, the first view had relied on the general principle of *Qarinah* in *Zina* while the second view seems to ignore this general principle but relied and stressed on the exceptions to the principle. In referring to the statement and practices of caliph Umar Ibn al-Khattab two essential points can be derived:

- 1) The existence of pregnancy for an unmarried woman is only a presumption that she has committed adultery. In other words, pregnancy is not a sole ground to warrant a conviction even if it establishes a *prima facie* case against the accused,

- 2) This presumption however can be rebutted or set aside by invoking one of the general defences available in Islamic law such as mistake (*al-khata'*) or under duress (*al-ikrah*) or she could even prove that she is still virgin by the expert. She will not subject to warrant a conviction as the essential element to prove adultery i.e. (*penetration*) was not fulfilled.³¹

As a conclusion, the first view which accepted the use of *Qarinah* as a presumption of the committing of adultery is preferred. However, it is subjected to certain points that must be given full observation before this presumption can lead to the punishment of *hadd*.

²⁹ Samori Z B, Op-cit footnote 23

³⁰ Hamid J, *Islamic Law of Evidence: Sources & Its Applicability with Special Reference to the Practices in Malaysia & Pakistan*, 2006, pp. 28-29 Available at <http://www>.

³¹ Ramlee Z, *The Role of al-Qarinah (Circumstantial Evidence) In Islamic Law of Evidence: A Study of The Law in Malaysia, With Reference To The Rules and Principles of English Law*, Thesis PhD, 1997, pp. 91-92.

1:4:3: CORROBORATION IN ZINA CASES

It was mentioned by the holy Prophet Muhammad (SAW), where he says:

"If I wish to stone somebody (for the offence of adultery) without being proved then I would stone a woman who arouse suspicion from the way she speaks, her appearance, and because of the person who enter her house".³²

This hadith had been used by the opponents of *Qarinah* to suggest that the Prophet himself had discouraged the use of *Qarinah*. However, by looking carefully the proviso from the hadith, we could find that the Prophet stressed that in the absence of proof, the availability of such circumstantial facts should not be used as a proof in the case of *Zina*. Adversely, if the case has been proved by independent evidence such as pregnancy, then such circumstantial evidence could be used to corroborate the evidence of pregnancy.³³

There are many types of circumstantial evidence that could be used to corroborate the *Qarinah* of pregnancy especially in this modern lifetime. For example:

- a) The accused's behaviour.
- b) The accused appearance.
- c) The presence of semen on the vaginal swabs of a woman.
- d) The existence of contraceptive methods such as spermicides or progestogen pills in the possession of an unmarried woman.

1:4:4: PREGNANCY IN TA'AZIR PUNISHMENT.

Another question arises as to whether pregnancy may be used as evidence in imposing *Ta'azir* punishment in the case of *Zina*? The general principle is that, all jurists unanimously agreed in accepting pregnancy as kind of evidence in imposing *Ta'azir* punishment subject to the fulfilment of its condition although the standard of proof is not the same as in *hadd* punishment.³⁴

The issue of pregnancy as evidence in convicting and sentencing to *Ta'azir* punishment was discussed in several cases. Thus in the case of *Mst. Rani v. The State*,³⁵ whereby the appellant Mst Rani had been convicted under section 10(2) of the Offence of *Zina* (Enforcement of Hudud) Ordinance, 1979 (which referred to *Ta'azir* punishment), while sentencing her to undergo rigorous imprisonment for two years with seven stripes and to pay fine of Rs.1000 or in default to undergo rigorous for six months. It was decided that:

i) Mere pregnancy is not sufficient to convict a woman for *Zina* especially where she claims the pregnancy have been caused as a result of rape.

ii) To convict a woman for *Zina*, the prosecution would have to discharge the heavy onus of proof by bringing forth positive and independent evidence that the woman actually and in fact had committed *Zina* with her own free will and consent with another man to whom she was not lawfully married to. In this regard, it may also

³² Al-Bukhari M, *Sahih al-Bukhari*, English Translation of M.M.Khan, 5th ed, (Kazi Publications, New Delhi, 1984, vol. 9), (Kitab al-Muharibin), pp558-559

³³ Ramlee Z, *The Role of al-Qarinah (Circumstantial Evidence) In Islamic Law of Evidence: A Study of The Law in Malaysia, With Reference To The Rules and Principles of English Law*, 1997, p.93

³⁴ Hamid J, *Islamic Law of Evidence: Sources & Its Applicability With Special Reference to the Practices in Malaysia & Pakistan*, 2006, pp. 28-29

³⁵ PLD 1996, Karachi 316.

be stated that the mere proof of pregnancy or some form of medical testimony or report on its own could be of no consequence as the latter would at best only to be corroborative in nature.

iii) In the situation as envisaged in (i) above the woman like any other accused is also entitled to a benefit of doubt.

A similar view was taken in another judgement in the case of *Mst. Safia Bibi v. The State*³⁶, where the facts of the case are quite similar to the facts in the first case. In This case, a woman alleged rape (*Zina-bil-jabr*) committed by an accused male to be the cause of her pregnancy. The court acquitted the male accused for want of evidence; however the woman was convicted under section 10(2) of the 1979 Ordinance on the grounds that the mere pregnancy was sufficient to find a conviction of *Zina* against her.

On appeal it was held that while dealing with the position of female accused, the Court came to the conclusion that she should not be convicted for *Zina* when she pleaded pregnancy as a result of rape on her. "The court further held that: if unmarried woman delivering a child pleads that the birth was the result of commission of the offence to rape on her, she cannot be punished. This view was held based upon the hadith from the Prophet (SAW) who said:

"My people are excused for mistakes, forgetfulness and for anything done under compulsion). It is reported from Abdul Jabbar on the authority of his father that a woman was raped and the Prophet Muhammad (SAW) acquitted her."

Since the case of *Zina* needed four witnesses to verify the truth and there was none available, the case instead of *hadd* punishment of stoning, was referred to *Ta'azir* punishment for abetment in the illicit sexual intercourse.

1:5 CONCLUSION

In conclusion, it is submitted that the first view of Ulama's which accepted the use of *Qarinah* as a presumption of committing adultery is more preferable. *Qarinah* can be used as a sole evidence to implicate and charge an accused for the offence of *Zina* as this has been practiced by the holy Prophet Muhammad (SAW) as well as his companions. But however, it is only strong *Qarinah* which can attain the degree of certainty (*Yaqin*) that can be relied upon in order to warrant a conviction of *hadd* punishment. Nonetheless, in many cases, it is very hard to prove and attained the standard of *Yaqin*. Therefore, imposing *Ta'azir* punishment seems to be in line with the principles of "*Masalih Al Mursalah*" public interest for safeguarding the society. Thus, for instance in the case of pregnancy without lawful husband, it can be used as a kind of evidence in imposing *Ta'azir* punishment subject to the fulfilment of its condition, though, the standard of proof is not the same as in *hadd* punishment, since in imposing *Ta'azir* punishment the standard of prove required is only strong probability (*Ghalabah-Al-Zann*) which is lower than level of certainty (*Yaqin*). Therefore, the existence of pregnancy for an unmarried woman is only a presumption that she has committed adultery. In other words, pregnancy is not a sole ground to warrant a conviction even if it establishes a *prima facie* case against the accused unless it is corroborated by other evidence which could be subject to *Ta'azir* punishment. This presumption can be set aside as discussed earlier by invoking one of the general defences available in Islamic law such as mistake, duress or sexual

³⁶ PLD 1985, FSC 120.

intercourse while asleep as it happened during the time of companions of the holy Prophet Muhammad (SAW).