

Oral Testimony in Offences of Zina (Fornication/Adultery) under Maliki School of Thought

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ABSTRACT

The means of proving the offence of Zina (fornication/adultery) under Maliki School could be through any of these means, thus, four (4) males, muslims, adult and credible witnesses, or (2) voluntary admission/confession; or (3) circumstantial evidence (unaccounted pregnancy from unmarried woman). For the testimony of witnesses to ground conviction the witnesses must be unanimous in describing the penetration of the male accused penis into the virgina of the female accused as well as witnessing the said act as described at the same time and place. In the event of inconsistencies or differences in explaining any of the above, their testimony will not be admissible and each of them will be punished with eighty lashes for committing false accusation (Qazf). It should be noted that Maliki School's opinion is the recognized opinion by law that should be applied before Shari'a/Area Courts and Shari'a Court of Appeal. This paper examined the authorities relied upon by Maliki School which stipulates that, in the case of the offence of Zina, if the witnesses are not up to four or where they are four but an inconsistency or differences is found in their testimony each of them is guilty of the offence of false accusation (Qazf) with a view to highlight the conflict between the said opinion and the Qur'ani chapter 14, verse 4. The paper adopted doctrinal research approach wherein relevant existing literatures were analyzed.

Keywords: Islamic law, Islamic criminal law of evidence, offence of zina, offence of false accusation (Qazf).

1.1 INTRODUCTION

The basic principle governing the incidence of means of proof under Shari'a (Islamic Law) is the prophetic tradition which provides:

"لو يعطى الناس بدعواهم لادعى ناس دماء رجال وأموالهم ولكن البينة على من ادعى واليمين على المدعى عليه."¹

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Translation:

"If people's claim are to be granted based on their face value by courts, people would have claimed the lives and properties of other persons, but the burden of prove is on the plaintiff and the oath of its rebuttal is on the defendant."

Based on the above cited prophetic tradition, shari'a places the burden of prove on a person who makes an allegation whether civil or criminal, whether affirmative or negative, to persuade the court either by preponderance of evidence, if it is civil case, or beyond reasonable doubt, if it is criminal allegation, that the material facts which constitute his whole case are true.²

The burden of proof in criminal cases, thus, Hududu, Qisas and Ta'azir is nowadays is on the prosecution based on the jurisprudential principles which provides:

"الأصل براءة الذمة"³

Translation:

"Each and every person is presumed to be innocent."

"الأصل إبقاء ما كان على ما كان."⁴

Translation:

"The legal presumption is respect of anything and any person is that, it remains as it is or as he/she is known to be originally."

"المتهم بريء حتى تثبت إدانته"⁵

Translation:

"An accused person is presumed to be innocent until contrary is proven."

Meaning, an accused person, does not have any obligation to prove his innocence, the burden remains with the prosecution throughout until when the prosecution proves his case beyond

¹ Sahih Muslim, Kitab al-Agriyya, Babu al-yamin ala al-muda'a alaihi, vol. 2, p. 59.

See also

Abu Dawuda, Kitab al-Aqriyya, Babu al-yamin ala al-mudda'a alaihi vol. 2 p. 305.

² Al-fatih, M. I., Al- Ta'aliq ala Qanun al-Isbat, Fiqhanwa Qara'an, Maktabat Markaz al-Da'awa, African Internation University, Khurtoum Sudan, (2011), p. 1.

³ Muhammad al-Bayani, A, Al-Qawa'id al-Fiqhiyya fil al-Qara'a, Dhar al-Kutub al-Ilmiyya, Beirut, (2015), vol. 2, p. 279.

⁴ Ibid.

⁵ Ibid.

reasonable doubt as required by shari'a, in the event of any doubt, such doubt will be resolved infavour of an accused person based on the prophetic tradition which provides:

"ادرعوا الحدود عن المسلمين ما استطعتم فإن وجدتم للمسلم مخرجاً فخلوا سبيله، لأن يخطئ الإمام في العفو خير من أن يخطئ في العقوبة".⁶

Translation:

"Avoid applying punishment whenever doubt exists, it is better for a judge to make a mistake in discharging and acquitting an accused person than making mistake in convicting an innocent person."

The means of proving offence of zina under Maliki School of thought are as follows:

- a. Four males credible witnesses; or
- b. Admission/confession; or
- c. Circumstantial Evidence

According to Maliki School for the testimony of witnesses to ground conviction of the offence of zina (fornication) all of the witnesses must be (1) Muslims, (2) males, (3) sane, (4) adult and (5) credible, they should also be unanimous in describing the followings: (1) penetration of the male (accused) genital into the virgina of the female (accused), (2) witnessing the said act, as described at the same time and place. If there are inconsistencies or differences among the witnesses in explaining any of the above, their testimony will not be admissible and all of them will be furnished eighty (80) lashes each for committing qazaf (false accusation).

It should be noted that, Maliki School's opinion is the applicable opinion in the shari'a and Area Courts⁷. It should be further noted that Maliki's opinion which stipulates that, in the case of the offence of zina if the witnesses are not up to four (4) or where they are four (4) but inconsistency or differences if found in their testimony all of them is guilty of the offences of false accusation (Qazf) and each should be punished with eighty lashes. This view is in conflict with the clear provision of the Qur'anic chapter 24, verse 4 (Surat al-Nur).

⁶ It has been reported by Tirmizi, Baihaqi, Hakeem and Dar al-Quduny in Jami'I Tirmizi Ma'a Tuhfatu al-Ahwazy, Dhar al-muhasive lil-Diba'a, Cairo, (1966) vol. 2, p. 318.

⁷ See: Section 13(a) Shari'a Court of Appeal law, cap. 134 see also the case of ; Abubakar Danjuma V. Safaya Umar S.Q.L.R. (pt 11), vol. 3, 2015, p. 338 at p. 343, para 7.

The main objective of this paper is to highlight the conflict between the Maliki School's opinion on this issue and the said Qur'anic verse with a view of recommending re-visiting the opinion of Maliki School on the issue.

1.2 DEFINITION OF ZINA (FORNICATION/ADULTERY) ACCORDING TO MALIKI SCHOOL

Zina is the voluntary sexual intercourse of male, muslim and adult with a woman who is not his lawful wife and there is no any other lawful right or element of doubt as its being illegal, whether alive or dead, through either her virgina or rectum".⁸

The text reads:

"الزنا : هو إيلاج مسلم، مكلف، حشفة، في فرج آدمي ، مطبق، عمدا بلا شبهة،
وإن دبيرا أو ميتا".⁹

1.3 BASIC ELEMENTS OF ZINA ACCORDING TO MALIKI SCHOOL:

Based on the above quoted definition of zina, the followings are considered to be basic elements of zina:

1. There should be penetration of the male genital into the vagina or rectum of a capable woman who is not his lawful wife and there is no any other lawful right or element of doubt, whether a woman is alive or dead. This clearly also exclude, children and insane person. The definition also excludes involuntary sexual intercourse which is not resulted from voluntary intoxication.
2. The definition excludes non-Muslims. Meaning, if a non-Muslim commits what is considered as zina, he will not be liable to punishment.¹⁰
3. The definition excludes sexual intercourse with animals or any other non-human-being.¹¹
4. Sexual-intercourse with his wife whom he divorced three (3) times in one word (i.e. I divorce you three times) or at different occasions, is also considered as zina."¹²
5. It is trite law that under Islamic law a person can only marry four (4) women at a time. In other words he cannot marry more than that during the subsistence marriage

⁸ Ibn Dhahir, H., *Al-fiqh al-Maliki wa Adillatuhu*, Ma'assat al-ma'arif, Beirut, (2009), vol. 7, p. 267.

⁹ Ibid.

¹⁰ Ibid p. 268.

¹¹ Ibid.

¹² Ibid, p 269.

- of those four women, but if he does and as well has sexual-intercourse with the fifth one he commits zina, if he knows shari'a a position on the issue.¹³
6. According to shari'a principle, certain categories of women are unlawful to marry, such as biological mother, daughter, his mother's wife, his full or half sisters, among others. If a person marries any of them and have sexual-intercourse he will be guilty of the offence of zina.¹⁴
 7. If a person divorces his wife through the process of Khul (thus, where a wife give her husband something to gain her liberty, divorce), if he has sexual-intercourse with her during her iddah (prescribed waiting period after divorce) period, he is guilty of the offence of zina.¹⁵
 8. If a person marries a woman during her idda period from the divorce of another person and have sexual-intercourse with her, he commits zina and is liable to punishment.¹⁶
 9. A person (male) who commits zina under threat will be liable to punishment, according to the popular opinion of the school. But imam Lahmy, ibn al-Araby and Ibn Rushd held contrary opinion. However, a woman who commits zina under threat or duress will not be liable to punishment.¹⁷
 10. A woman who had an illicit sexual-intercourse with an insane male is guilty of zina and will be liable to punishment unless if she did it under threat or duress.¹⁸
 11. A woman who voluntarily put the genital of a sleeping person into her virgina commits zina and is liable to punishment.¹⁹

1.4 Means of proving the offence of zina under Maliki School:

The offence of zina could be established in any of the following three (3) means according to Maliki School, vis:

1. Confession/Admission (IQRAR)

Confession is considered to be among the means which the offences of zina called be established, if it satisfy the following conditions:

¹³ Ibid.

¹⁴ Ibid, 270.

¹⁵ Ibid.

¹⁶ Ibid, p. 271.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

- a. It should be voluntary. In other words, the confession must be made of free will and consciously. It must be unequivocal and clear without any doubt (Shubha). In the absence of free will or the presense of doubt the confession is rendered null and void and is inadmissible.
- b. The confessor, male or female, must be adult, and sane. The confession of a child or insane is invalid.
- c. Even a single confession may ground conviction.
- d. The confessor must maintain his/her confession. However, if a confessor retract his/her confession at any stage before execution of the judgement or during execution of judgement his/her confession becomes invalid.

Also running away while executing the judgement by the confessor is also regarded as implied retraction, which renders his/her confession invalid.²⁰

According to Imam Qurduby, it is preferable for a judge, to remaind an accused person his/her right of retraction.²¹

They supported their opinion with the following authorities:

حديث أبي هريرة وزيد بن خالد الجهني وفيه قال النبي صلى الله عليه وسلم: "واغد يا أنيس على إمرة هذا فإن اعترفت فارجموها".^{٢٢}

Translation

"It is reported by Abu Huraira and Zaid bn Khalid Jahany, the Prophet (peace be upon him) ordered Unais to go the woman (whose co-accused had confessed committing zina with her), to ask her, if she confess, she shoulde be stoned to death (because she was a married woman).

They argued that the above quoted Hadith is a clear authority on the validity of confesseion as a means of prove in the case of zina.

²⁰ See the following books:

- a. Al-fiqh- al-Maliki wa Adillatuhu, cpp. Cit, vol. 7, ps, 281 - 4.
- b. Ign Abdulbar, Al-kafy fi fiqh Ahl al-Madina, al-Maliky, wa Ma'adeen al-Jauhar, Maktabat al-Asariyya, Beirut, (2011), vol. 2, ps 196 – 200.
- c. Al-Shanqidi, M. A., Tabyini Al-Msaliki Shar Tadrib Saliki Ila Aqrab Al-Masaliki, Dhar Garb al-Islamiy, Beirut, 1995, vol. 4, ps 391 – 4.

Al-shanqidy, A. M., Mawahib Al-Jalil min Adilat Khalil Maktabat Ayub, Kano-Nigeria, (2003), vol. 4, p. 338.

²¹ Al-fiqh- al-Maliki wa Adillatuhu, cpp. Cit, vol. 7, p. 282.

²² Quoted in ibid, p. 280.

They further argued that the same Hadith is also an authority that a single confession will be sufficient to ground conviction in the offence of zina, because the prophet did not instruct unays to ask her to confess four times, but, rather one.²³

"عن زيد بن أسلم أن رجلا اعترف على نفسه بالزنا على عهد رسول الله صلى الله عليه وسلم فدعا له رسول الله صلى الله عليه وسلم بسوط مكسور، فقال: "فوق هذا" فأتى بسوط جديد لم تقطع ثمرته، فقال: "دون هذا" فأتى بسوط قد ركب به ولان، فأمر به رسول الله صلى الله عليه وسلم فجلد ثم قال: "يا أيها الناس قد آن لكن أن تنتهوا عن حدود الله. من أصاب من هذه القاذورات شيئا فليستتر بستر الله، فإنه من بدى لنا صحفته نقم عليه كتاب الله."²⁴

Zaid bn Aslam is reported to have said: a man came to the Prophet (Peace be upon him) and confessed committing zina, the Prophet instructed his punishment with lashes, and he was punished with lashes, then the prophet said:

"O you people it is high time for each and every one of you to stop committing this type of offence, and if any one of you commits it, he should conceal it to himself and ask the forgiveness of Allah (SWT), but if he disclose it, we will definitely punish him with the prescribed punishment."²⁵

They argued that the Prophet punished the man who admitted committing zina once, he did not require him to repeat his confession.

Based on the above quoted Hadith, they argued a single confession is sufficient to grand conviction for the offence of zina.²⁶

Those jurists (Maliki School) also supported their stance with analogy. They said: In regards to any other Hadd offence, a single confession has been unanimously accepted by all other schools to be sufficient in grounding conviction, so, analogically, this same opinion should be extended to the offence of zina.²⁷

In respect of the Hadith of Ma'iz who made four separate confessions before to be punished by the Prophet (Peace be upon him), they said: Ma'iz's case was a peculiar one because the Prophet

²³ Ibid.

²⁴ It has been reported in Muwadda Malik, in the Chapter, whoever admits committing zina. Quoted in ibid.

²⁵ Al-fiqh Al-Maliki wa Adillatuhu, opp. Cit p. 280.

²⁶ Ibid.

²⁷ Ibid.

was doubting his mental stability, that was the reason why prophet made an inquire as to whether Ma'iz was mentally stable (he was sane), when it was confirmed to him that he was sane, he ordered him to be punished. In other words, the procedure applied in Ma'iz's case was limited to his case it does not extend to other cases of zina.²⁸

2) The second means of proof is through witnesses:

The following conditions must to be satisfied for an accused person to be punished for the offence of zina based on the testimony of witnesses, thus:

- a) The witnesses must be four (4) in number.²⁹
- b) They should be males, adults, sanes and credible (Udul).³⁰
- c) All of them must be muslims.
- d) Each and every one of the witnesses must state expressly that he saw the actual penetration of the accused's penis into the vagina of the female accused person.³¹

In the event of inconsistency in their testimony, all of them are guilty of false accusation (Qazf), for that, each of them will be punished with eighty lashes.³² In other words, if there is variation in the testimony of the witnesses in respect to the month, day, hour, place, town or position of the two accused persons. For instance, if one of the witnesses said, he saw them in the hour of 12:30pm and another said, he saw them at the hour of 1:00pm, etc. all of them will liable to punishment of eighty lashes each.

Again, if any of the four witnesses decline to testify, the three (3) who testify will be punished eighty lashes each for false accusation. They supported their opinion with the following authorities:-

Allah (SWT) said:

"وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا
تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا ۚ وَأُولَٰئِكَ هُمُ الْفَاسِقُونَ ۝٣٣"

Translation:

²⁸ Ibid.

²⁹ Al-Talqeen fi fiqh al-Maliki, opp. Cit, p. 498.

³⁰ Tabyeen Al-Masalik Sharh Tadribul-Al-salik opp. Cit, vol. 4, p. 493.

³¹ Al-Kafy fi Fiqh Ahlul Al-Madinah, Al-Malikiy, opp. Cit, vol. 2, p. 348.

³² Ibid.

³³ Qur'an 24:4.

"And those who accuse chaste women, and produced not four witnesses, flog them with eighty strips, and reject their testimony forever, they indeed are the liars, rebellious, and disobedient to Allah."³⁴

"عن أبي هريرة أن سعد بن عبادَةَ قال لرسول الله صلى الله عليه وسلم: أرأيت إن وجدت مع إمراة رجلًا أَمِهلُه حتى آتي بأربعة شهداء؟ فقال رسول الله صلى الله عليه وسلم: "نعم"³⁵

Meaning:

It is reported from Abu Huraira that Sa'ad Ibn Ubada said: I asked the Prophet (peace be upon Him) if a person caught his wife red-handed committing adultery with another person is it an obligation upon him that he must invite four people to witness, for him to establish his claim the claim, the Prophet (peace be upon him) said: "Absolutely".

"إجماع الصحابة" فقد جلد عمر الثلاثة الذين شهدوا على المغيرة بالزنا لما توقف الرابع. ولم يخالفه أحد من الصحابة في كون الثلاثة لا يكفي في إثبات الزنا.³⁶

Meaning:

Umar bn al-Khattab punished three (3) witnesses with eighty lashes each when the fourth one declined to testify in respect of the Mugira's case, who was accused of committing zina, he gave the ruling in the presence of other Prophet's companions and non of them raised an objection to that ruling.

3) The third means of proving zina is unaccounted pregnancy from an unmarried woman.

In other words, the appearance of a pregnancy from the unmarried woman which cannot be accounted for by her, is considered to be sufficient circumstantial evidence that can ground conviction for the offence of zina according to Maliki School.³⁷

The school supported their opinion with the following authorities:

³⁴ Interpretation of the meaning the Noble Qur'an in the English Language, by: Muslim Khan, M. and Taqi-ud-Din Al-Hilali, M. Darussalam, Riyadh – Saudi Arabia, (1996). 459.

³⁵

³⁶ It is reported in the book of Muwaddah Imam Malik in the chapter, Babu Qadha'I Fiman Wajada Ma'a Imra'atuhu Rajulan, and the book of sahih muslim, in the chapter on Li'an, Quoted in fiqh Al-Maliky was Adillatuhu, opp. cit, vol. 7, p. 284.

³⁷ Ibid. 286.

"إجماع الصحابة على قول عمر بن الخطاب فعن عبد الله بن عباس أنه قال:
 "سمعت عمر بن الخطاب يقول: "الرجم في كتاب الله حق على من زنى من
 الرجال والنساء، إذا أحصن، إذا قامت البينة أو كان الحمل أو الإقرار".³⁸

Meaning:

Abdullahi Ibn Abbas is reported to have said:

"I heard Umar Ibn Khatab saying: punishment for stoning to death for the offence of zina has been established by the book of Allah for both males and females who are Muhsin (Married), whenever the offence is proved against any of them through witnesses, uncounted pregnancy or confession."

However, if such a woman, with unaccounted pregnancy claimed that someone had sexual intercourse with her while she was sleeping, or she honestly assumed that the man who had sexual intercourse with her was her husband, such a claim should be considered as shubha (doubt), for that, she should not be punished.³⁹

The text reads:

"وأما دعواها أنه من وطء بشبهة أو غلط وهي نائمة فتقبل، لأن هذا قد يقع. قال الإمام اللخمي: إن لم تذكر ذلك إلا بعد الحمل حدث، إلا أن تكون معروفة بالخير وقلت: كتبت ذلك رجاء أن لا أحمل، أو أن يسقط، فإنها تعذر".⁴⁰

1.5 Punishment of Zina (Fornication/Adultery):

The punishment of zina is classified into two, depending on whether the act was committed by a married or unmarried person. If it is committed by a married person the punishment is stoning to death, and if it committed by unmarried person the punishment is hundred lashes and exile of one year.⁴¹

³⁸ Reported in Muwadda of Imam Malik in the chapter, Babu Ma Ja'a fi al-Rajamu, in the Hadith al-Bukhari, in the chapter, Babu Rajm al-Habla min zina iza Ahsanna, and Hadith of Muslim, in the chapter, Babu Hadd Al-zina, quoted in Ibid, p. 287.

³⁹ Al-Fiqhu Al-Maliki wa Adillatuhu, Opp. cit, Vol. 7, p. 287.

⁴⁰ Ibid.

⁴¹ See the following books:

- (a) Mawahib Al-Jalil min Adillat Khalil, opp. cit. vol 4, p. 338.
- (b) Tabyeen Al-masalik Sharh Tadreb Al-salik Ka'aqab Al-Masalik, opp. cit, vol. 4, p. 493.
- (c) Al-Kafy Fi Fiqhu Ahlul Al-Madinah Al-Maliki, opp. cit, vol. 2, p. 346.

Punishment of stoning:

Punishment of stoning is applicable to both males and female guilty of committing zina who are either presently married or have married before even if they are no more married (Muhsin). The following conditions must be satisfied for a person to be legally Muhsin (Marriage Status which will qualify a person to be liable to this punishment). Vis, he must be;

- a. Adult;
- b. Sane;
- c. Muslim;
- d. Had sexual intercourse through a legally valid marriage.⁴²

In other words, a sexual-intercourse through an illegal means will not make a person Muhsin.⁴³ Likewise sexual-intercourse through invalid (Fasid) or a doubtful (Al-WADA'U BIL-SHUBHA) marriages will not make a person Muhsin.

Again, a sexual-intercourse with unfit and unable woman will not render a person Muhsin, likewise having sexual-intercourse with minor will not render a woman Muhsin.⁴⁴

Where the above cited conditions are satisfied and the allegation is proved beyond reasonable doubt, the two adulterers should be stoned to death based on the following Prophetic Ahadith.

"عن عبادة بن الصامت قال: قال رسول الله صلى الله عليه وسلم: "خذوا عني
حذوا عني قد جعل الله لهن سبيلا البكر بالبكر جلد مائة ونفي سنة والثيب بالثيب
جلد مائة والرجم"⁴⁵

Meaning:

"On the authority of Ubada bn Thamit who said: The Prophet (peace be upon Him) said: "Take (this ruling) from me, take from me, certainly Allah has provided a way out for them (women/adulterers). For the unmarried adulterers (males and females) they should be punished with eighty lashes and one year exile, and the punishment for the married adulterers (both males and females) is stoning to death."

⁴² Al-Fiqhu al-Maliki Wa Adilatuhu, opp. cit, vol. 7, p 5, 289 – 90.

⁴³ Ibid, p, 290.

⁴⁴ Ibid.

⁴⁵ Quoted in Ibid.

"عن أبي هريرة وزيد بن خالد الجهني أنهما أخبرا أن رجلين اختصما إلى رسول الله صلى الله عليه وسلم فقال أحدهما: يا رسول الله اقض بيننا بكتاب الله، وقال الآخر وهو أفعهما: أجل يا رسول الله فاقض بيننا بكتاب الله، وأذن لي في أتكلم، قال: "تكلم" فقلا إن ابني كان عسيفا على هذا، فزني بامرأته، فأخبرني أن على ابني الرجم فاتقديت منه لمائة شاة وبجارية لي، ثم إني سألت أهل العلم فأخبروني أن ما على ابني جلد مائة وتغريب عام، وأخبروني أنما الرجم على امرأته. فقال رسول الله صلى الله عليه وسلم: "أما والذي نفسي بيده لأقضين بينكما بكتاب الله، أما غنمك وجاريتك فرد عليك" وجلد ابنه مائة وغرب عاما، وأمر أنيسا الأسلمي أن يأتي المرأة الآخر فإن اعترفت رجمها، فاعترفت فرجمها. وفي رواية قال النبي صلى الله عليه وسلم: "اغد يا أنيس على امرأة هذا فإن اعترفت فارجمها" فغدا عليها فاعترفت فرجمها."⁴⁶

Summary meaning:

It was reported on the authority of Abu Hurairah that unmarried man admitted committing adultery with a married woman before the Prophet (peace be upon him), the Prophet ordered him to be punished with 100 lashes and one year exile, and ordered one of his companion, Unais, to go to the said woman and asked her, if she confesses, she should also be punished, when she confessed, she was stoned to death.

(3) It was reported by Abu Hurairah and Ibn Abbas that, Ma'iz came to the Prophet (peace be upon Him) and admitted committing zina four (4) times, and the Prophet ordered him to be stoned to death and he was stoned to death."⁴⁷

(4) Imran Ibn Hussain reported that, a woman (GAMIDIYYA) came to the Prophet and admitted committing zina, thus, the pregnancy she was carrying was as a result of zina, the Prophet (peace be upon him) asked her to go back and deliver, when she delivered she came back to the Prophet and the Prophet asked her again to back and wine the child, she did and came back afterwards, then the Prophet ordered her to be stoned to death and she was stoned."⁴⁸

Punishment of lashing

If an offence of zina is committed by unmarried male or female (who has not married before) and is proved before a court of law beyond reasonable doubt, the accused, male or female, should be punished with one hundred (100) lashes, and one year exile⁴⁹ (nowadays one year

⁴⁶ Quoted in Ibid, p 298 – 9.

⁴⁷ Quoted in Ibid.

⁴⁸ Quoted in Ibid.

⁴⁹ Mawahab Al-jalil Min Adilat Khalil, cpp., cit, vol. 4, p. 338.

imprisonment)⁵⁰. It should be noted that punishment with one year exile does not apply to women. In other words, a woman will only be punished with one hundred (100) lashes.⁵¹ They supported their view with the following authorities:

"الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة...."⁵²

Translation:

"The woman and the man guilty of fornication flog each of them with hundred stripes."

"عن عبادة بن الصامت قال: قال رسول الله صلى الله عليه وسلم: "خذوا عني خذوا عني قد جعل الله لهن سبيلا البكر بالبكر جلد مائة ونفي سنة والثيب بالثيب جلد مائة والرجم."⁵³

Translation:

On the authority of Ubada bin Samit who said: the Prophet (peace be upon him) said: Take (this ruling) from me, take from me, certainly Allah has provided a way out for them. For the unmarried male and female guilty of fornication punish each of them with eighty stripes and one year exile, and for married ones stoned them to death.

1.6 CONCLUSION

The means of proving the offences of zina (fornication/adultery) under Maliki School of thought are three, vis;

- (1) Four (4) credible, males adults and Muslims witnesses, or
- (2) Admission/confession; or
- (3) Circumstantial evidence.

According to the school, for the testimony of witnesses to ground conviction, the witnesses must be unanimous in describing the following:

- 1) Witnessing the penetration of the male (accused) penis into the vagina of the female (accused).
- 2) Witnessing the said act as described at the same time and place.

⁵⁰ Tabyeen Al-Masalik Sharh Tadreeb Al-saleek Ka Aqrab Masaliki, opp. cit, vol. 4, p. 493.

⁵¹ Ibid.

⁵² Q: 24:2.

⁵³ Quoted in Al-Fiqhu Almaliki wa Adillatuhu, opp. cit, vol/ 7. P. 290.

In the event of inconsistencies or differences in explaining any of the above, their testimony will not be admitted and each of them will be punished with eighty (80) lashes for committing false accusation (Qazf).

1.7 FINDINGS/OBSERVATIONS

The followings are the findings of this paper: The offence of zina could be established through any of the following three means; viz: Through four (4) credible, males, Muslims and adult witnesses or; Voluntary confession/admission of a sane, Muslim and adult male or female. Circumstantial evidences, thus, un accounted pregnancy from unmarried woman. The witnesses must be unanimous in explaining any of the following:

- a. Witnessing the actual penetration of the accused's penis into the vagina of the accused woman; and
- b. Witnessing the said act as described at the same place and time.

Based on all the above findings, it is the humble and respectable recommendation of this paper that the opinion of Maliki School which stipulates that in the case of the offence of zina, if the witnesses are not up to four (4) or they are four (4) in number, but an inconsistency or differences occurred in their testimony, each is liable to punishment with eighty lashes, should be revisited for the following reasons:

There is neither explicit Qur'anic verse or authentic Prophetic Hadith which says expressly that in the event of inconsistencies or differences in their testimony each of the witnesses is guilty of committing false accusation and to be punished with eighty lashes, because the Qur'anic verse relied upon by the school, refers to the person/s who made false accusation, not a witness, because the witness is only recounting what he witnessed unless if he says categorically that, he witnessed accused persons committing.