

Qarinah: Admissibility of Circumstantial Evidence in *Hudud* and *Qisas* Cases

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Abstract

Two recent developments in Brunei and Malaysia on hudud and qisas implementation have revived the keen discussion and debate on admissibility of qarinah. The Brunei monarch has already approved the hudud, qisas and ta'zir implementation and a special committee has already been set up to look into several substantive, procedural and administrative matters. In Malaysia, the Kelantan government is currently looking into some preliminary matters regarding hudud, qisas and ta'zir application in view of the recent Federal Government's green light on the said syariah criminal law application. The said state government is already in the midst of engaging itself into important discussions with other relevant authorities on the said matter. In view of these two recent developments, this paper strives at analyzing the issue of qarinah admissibility in hudud and qisas cases. Attempt is also made in identifying some misconceptions on the said issue while coming up with some analytical response on dispelling the misconceptions.

Keywords: *admissibility; qarinah' circumstantial evidence; criminal investigations; criminal prosecution; hudud; qisas; ta'zir*

1. Introduction

Syariah law particularly matters relating to criminal offences has always been the subject to heavy criticisms by Western scholars. There are preconceived notions that its substantive nature was harsh and inhumane. However, merely overemphasizing on the substantive aspects of syariah law would not be a correct and sufficient to understand the souls and rationales behind its imposition by Allah S.W.T. It is inherently universal in nature that administration of criminal justice does not rely solely on substantive law. Procedural aspect is equally important in order to provide a mechanism in

proving the alleged crime. These two aspects are indispensable and inseparable in nature and cannot be simply ignored when discussing about criminal justice.

Muslim scholars are divided in opinions when it comes to the conclusiveness of circumstantial evidence. This is due to the principle of fundamental *shar'iah* that *hadd* punishments are not to be carried out if there is a slight element of doubt in existence. (Hadith Trimidhi : "*idra'u al-hududa bi'shubhat*" which means "drop the hudud in all cases of doubt") (Asifa Quraishi, 2001). Thus, the question arises regarding admissibility of circumstantial evidence in *hudud* crime. Can circumstantial evidence or *qarinah* be admitted in hudud cases? Can it become a ground for conviction of the accused? Or could it be used on *ta'zir* offences only?

In syariah law of evidence, evidence is known as *bayyinah*. Literally, it means 'clearness' but technically, the term refers to a thing which clarifies or explains a right or interest (Saedon, 2003). Al-Quran as the main source of syariah law has explained clearly on several types of proof mainly by way of testimony of witnesses known as *syahadah* and by way of confession, also known as *iqrar*. This principle is also supported by several *hadith* of the Prophet Muhammad S.A.W.

The Holy Quran states in the following two verses:

"O you who believe! Be steadfast witnesses for Allah in equity and let not hatred of any people seduce you that you do not deal justly" (Al-Quran, 5:8), (Yusuf Ali, 2005).

"O you who believe! Be you staunch in justice, witnesses for Allah even though it be against yourselves." (Al- Quran, 4:135), (Yusuf Ali, 2005).

Muslim scholars are divided on this because syariah criminal law itself is divided into two, one is offences which violate the right of Allah (*Hudud* and *Qisas*) and the other is offences against the right of individual (*Ta'zir*). The existence of two classification of offence created debate among muslim scholars because the manner of proving *Hudud* offence is expressly prescribed by the Holy Quran.

On the other hand, the term *qarinah* comes from the root word of '*qarana*' which signifies 'connecting something.' Technically, *qarinah* means any sign, proof or evidence which is circumstantial in nature which may corroboratively give a definitive impression of an occurrence of any relevant fact or any fact in issue in a case (Saedon, 1996; Zaidan, 1984; Azam, 2009).

Nevertheless, if we look into the definition of *bayyinah* given by Ibn Qayyim, the meaning is not exhaustive but comprehensive in the sense that it refers to anything which clarifies, explains or proves a particular thing (Saedon, 2003). The wide definition of *bayyinah* seems to suggest that *qarinah* or circumstantial evidence is one type of evidence that could be admitted under syariah criminal law. The above definition of *qarinah* seems to be in support of this notion. Nonetheless, the issue remains as to what extent is its applicability? And if it is admissible, can it be used in proving *hudud* and *qisas* crimes which are known with harsh punishments or should it be restricted to *ta'zir* offences only?

Apart from that, this writing will also look into the issue of burden of proof under syariah criminal law. It has always been pointed out that the standard of *yaqin* must be proven before any conviction and sentencing is made in *hudud* and *qisas* (Saedon, 2003). What is meant by *yaqin*? Does it similar with the standard of beyond reasonable doubt as applied in Common Law or is it higher? Can *qarinah* evidence satisfy such standard of proof?

2. Qarinah: Its Position as an Evidence in the Eyes of the Ulama'

The applicability of *qarinah* in proving a case is nowhere expressly provided by the Holy Quran. However, its applicability could be gleaned by references to several verses in the Holy Quran together with analogical deduction by the *ulama'*. If we look back to the definition of *bayyinah* given by Ibn Qayyim, it seems to suggest that proof is not exhaustive to *iqrar* and *syahadah* only. In simple words, anything that can prove a particular fact can be made admissible.

Qarinah in its literal meaning means connection, conjunction, relation, union, affiliation, linkage or association. However, in legally speaking, it refers to logical inference to be drawn from circumstances. Besides that, it is also called as presumption drawn from other facts proved or admitted to be true (Anwarullah, 2004). Majority of *ulama'* from the four scholars have accepted and recognized *Al-Qarinah* as one of means of proof. Their reason for admitting *qarinah* is based from sources in Al-Quran, *hadith* of the Prophet S.A.W and through the practice of companion.

Allah S.W.T says in the Holy Quran:

"They stained his shirt with false blood. He said: "Nay, but your minds have made up a tale (that may pass) with you. (For me) patience is most fitting: against that which ye assert, it is Allah (alone) whose help can be sought" (Al- Quran, 12:18), (Yusuf Ali, 2005).

“So they both raced each other to the door, and she tore his shirt from the back: they both found her lord near the door. She said: “What is the (fitting) punishment for the one who formed an evil designed against thy wife, but prison or grievous chastisement?” He said: “It was she that sought to seduce me from my (true) self.” And one of her household saw (this) and bore witness, (thus) “If it be that his shirt is rent from the front, then is her tale true, and he is a liar!” “But if it be that his shirt is torn from the back, then is she the liar, and he is telling the truth (Al-Quran, 12: 25-27), (Yusuf Ali, 2005).

It is indeed from these two verses that *qarinah* found its primary source. Both verses explained the incident that happened to Prophet Yusuf A.S. As explained by Mahmud Saedon A. Othman, the first verse stated above concerned with the plot run by the Prophet Yusuf A.S.'s brothers to cast him away from his beloved father Prophet Ya'qub A.S. They threw Prophet Yusuf A.S. down to the bottom of a well and brought back his shirt with false blood on the ground to deceive Prophet Ya'qub A.S. by telling that Prophet Yusuf A.S. had been devoured by a wolf. However, Prophet Ya'qub A.S. disbelieved of their allegations by saying that if Prophet Yusuf A.S. had been mauled by wolves, his shirt would have been torn into pieces while in that case, the shirt remain intact except for the presence of false blood. The second verse concerns with the incident happened to the Prophet Yusuf A.S. when he was defamed for trying to molest Zulaikha, a wife of a noble man. However, the fact that Prophet Yusuf's shirt was torn from the back shows the *qarinah* leading to the conclusion that Prophet Yusuf did not trying to molest Zulaikha, (Saedon, 2003).

Historically, Prophet Muhammad S.A.W has also recognized circumstantial evidence as source of proof in many cases. Anwarullah states that Prophet Muhammad S.A.W had once said:

“There were two women who had small sons. A wolf came and took away the son of one of them; One of them said to other, “It was your son”. The other said, “No, it was your son”. They brought their dispute to Prophet David A.S and he decided in favour of the elder. Then they went to Prophet Solomon A.S. and related to him their dispute for decision. He ordered to provide him a knife to make two pieces of the child so as to give one piece to each of them, On this, the younger one said, “Don't cut him into pieces, this is the son of the elder one.” Hearing this Prophet Solomon (PBUH) decided in favour of the younger one.” (Narrated by Abu Hurairah), (Anwarullah, 2004).

Furthermore, the Prophet Muhammad S.A.W. had once decided on paternity of someone on the basis of *qiyafah*. *Qiyafah* is a method of proving *nasab* or paternity based on resemblances and similarity features between one over another. *Qiyafah* is also considered as one type of *qarinah* as it concerns with the using of circumstantial evidence to establish someone's paternity (Saedon, 2003). In modern practice, *qiyafah* may be equated or further expanded with the usage of DNA analysis.

Nevertheless, there are also several scholars who rejected the applicability of *qarinah* as one type of proof. The crux of their argument rest on the issue that however strong the circumstantial is, it still contain slight element of doubt. This is because the weight of evidence can never match the weight attached to testimony given by witness who perceives the event with their senses or self confession by the wrongdoer. According to Mahmud Saedon A. Othman, their argument is supported by *hadith* of Prophet Muhammad S.A.W reported by Ibn Abbas which stated that:

“Prophet Muhammad S.A.W has said to the effect, “If I had wanted to stone someone without any proof, I would have stoned the woman who had raised suspicions as to her chastity due to her speech, the circumstances surrounding her and people who had approached her (residence) (Saedon, 2003).

In the above case, the Prophet Muhammad S.A.W did not imposed *hudud* punishment against the woman. However, it is humbly submitted that not all type of circumstantial evidence should be made admissible. Only the strong circumstantial evidence should be counted for. From the above *hadith* itself, we could see that the Prophet Muhammad refrained from imposing *hudud* based on suspicious evidence. Any suspicious or any doubt to the case does not justify for the imposition of *hudud* punishment. It is humbly submitted that this would not be the case when it involves strong *qarinah* and when the evidence gives the only inference which attains the degree of positive knowledge (Demetriades, 2001).

Nevertheless, based on the above arguments, we could deduce that in general, majority of Islamic scholars recognized *qarinah* as means of proof under Islamic law. Evidence from the verses in the Holy Quran had strongly justified its applicability. However, the only question remain is to what extent this type of evidence should be applied and whether it can also be used to prove *hudud* offences? Technically, Islamic scholars are divided in this issue although they unanimously agreed that there is no objection with regard to use *qarinah* in proving *ta'zir* offences.

3. Proof of Hudud and Qisas Offences by Qarinah: The Debate

The debate continues on whether or not *qarinah* may be used as type of proof. Muslim scholars are particularly engaged in a debate on its applicability and admissibility in proving *hudud* and *qisas* offences. The split among Islamic scholars on this issue requires great attention since each argument has its own merit.

In general, there are three separate views regarding this matter namely:

- i- The first view totally reject the use of presumption in either *hudud* or *qisas* offences. This view is actually expressed by Hanafi and Shafie's school. They supported their argument based on hadith reported by Ibn Abbas which has been stated earlier.
- ii- The second view partly accepted *qarinah* in proving *hudud* only on selective offences like pregnancy of unmarried women or smell of liquor from the accused (Anwarullah, 2004). Maliki's school is in support of this view and in case of unmarried women become pregnant without producing any plausible reason to explain her condition the *hudud* punishment will be inflicted on her ('Ata Sid, 1995).
- iii- The third view takes more liberal approach by recognizing *qarinah* in all cases including *hudud* and *qisas*. According to Anwarullah, they argued that evidence from testimony by witness is sometime more susceptible to concoction and fabrication. As such, *qarinah* may be seen as more compelling and stronger than *syhadah* (*testimony of witnesses* and *iqrar*(*confession*) because the real fact does not telling lies (Anwarullah, 2004).

Muhammad 'Ata al Sid further explained that the third view, which rules that *qarinah* evidence is applicable and admissible in all cases including *hudud* and *qisas*, supports their stand on several decisions during the period of Caliph Umar. Caliph Umar in one of his sermon explained that:

"I am worried that with the passage of time, some people will say: We do not find rajm(stoning) in the Book of God. They will then aberrate by abandoning a certain faridah ordained by God. Certainly, al rajm is a true punishment of the muhsan perpetrator of zina if bayyinah is established or if there is pregnancy or confession"

On a separate occasion, Caliph Umar also said that:

"I have found Ubaidullah smelling of a drink and I am going to inquire about the nature of the drink. If I find it intoxicating, I will flog him with hudud."

Caliph Uthman had also been reported imposing *hudud* punishment towards Al-Walid B. Utbah when there were witnesses who saw him drinking *khamr* and vomiting. Caliph Uthman had come to conclusion that the accused could not have vomited it unless he had drank it ('Ata Sid, 1995).

According to Ibn Qayyim the Imams and Caliphs had also imposed *hudud* punishment on people who had been caught in possession with stolen articles because the fact that the stolen articles was found in possession with accused gives a strong evidence against him (Saedon, 2003). This argument had actually dispelled the notion that Islamic law does not recognize circumstantial evidence as one type of evidence. In fact, Ibn Qayyim had stressed that the final purpose of the law of God is to establish justice among all people and as such, whatever means used to achieve such purpose must be taken as legitimate. What more when there is a situation where definite evidence cannot be procured, we have to look to the nearest available evidence in order to uphold the justice (El- Awa, 1998).

The debate on applicability and admissibility of *qarinah* in *hudud* and *qisas* cases drags on. For instance, Amin Al-Jarumi in his book expressed support to the opinion given by the muslim Scholars which rejected *qarinah* in proving *hudud* and *qisas* offences. He comes to conclusion that the majority view is more *rajih* or accurate upon looking into the nature of *hudud* offences and the severe repercussion carried by them. Since, evidence by way of *qarinah* still carries a slight element of doubt, it cannot be said that a case proved by such evidence satisfy the burden of proof beyond any doubt as required by *hudud* offences. This is also in line with principle to drop *hudud* punishment in case there is doubt. Nevertheless, he accepted the fact that *qarinah* may be used as corroborative evidence in order to support and explain other evidence such as *iqrar* or *syhadah* (Al-Jarumi, 2005).

Muhammad 'Ata al Sid, on the contrary, is of the view that *qarinah* is genuinely sufficient in the proof of *hudud*. He stressed that in general, all Islamic Scholars recognized the applicability of *qarinah*. Nevertheless, they have different opinions with regards to the detailing features before such evidence could be accepted. He further suggested that all the opposing arguments against *qarinah* has no strong basis and lamented that the effect of rejecting it will be an impediment to the cause of justice. What we must exclude is actually a weak type of *qarinah* and only strong type of *qarinah* shall be counted ('Ata Sid, 1995). Mahmud Saedon A. Othman in his book also shares the same view on this issue and stated that what actually suggested by the *ulama* is that only strong *qarinah* should be accepted, they did not totally reject

qarinah as a whole (Saedon, 2003).

4. Qarinah Evidence: The Malaysian Debate

Despite the above-mentioned relevancy and admissibility of *qarinah* in the eyes of syariah evidential principles, the debate in Malaysia as on whether or not *qarinah* evidence is admitted in *hudud* and *qisas* offences rages on. Indeed, this study has identified some negative perceptions towards relevancy and admissibility of *qarinah* evidence. There are basically two types of negative perceptions towards *qarinah* namely:

- i- Certain quarters within the Malaysian syariah legal fraternity claim that *qarinah* evidence can never become relevant and admissible in syariah criminal proceedings (particularly in *hudud* and *qisas* cases) in view of the *syahadah* requirements. They claim that *qarinah* evidence is frail, shallow and unreliable, making it impossible to be admitted in any syariah criminal trials. If ever *qarinah* is to become admissible, it would only be admitted in mal/non criminal cases.
- ii- There is another view regarding *qarinah*, claiming that *qarinah* evidence can only become corroborative evidence but could never be used as a basis of judgment and conviction in *hudud* and *qisas* cases.

This research would like to refute both negative perceptions as they are purely caused by misconceptions on the true nature of and concept of *qarinah*. The grounds of arguments are respectfully outlined in this paper.

4.1 A strong *qarinah*: Its admissibility and potential of fulfilling the standard of *yaqin* and *zan al Ghalib*

The critics argue the inapplicability and inadmissibility of *qarinah* evidence in convicting the accused of *hudud* and *qisas* punishment. They pointed out the ruling from muslim Scholars which decided that the burden of proof in *hudud* and *qisas* cases is beyond doubt or *yaqin* (Kamali, 2000). This means that an accused shall not be found guilty and punished with *hudud* and *qisas* punishments unless and until there is a strong evidence to justify the conviction beyond any doubt. Due to such circumstance, the critics rule that *qarinah* evidence is inadmissible in convicting and sentencing the accused of *hudud* and *qisas* punishment due to its impossibility of fulfilling the standard of *yaqin* in prosecution and conviction. This research refutes such claim. It is hereby argued that a strong *qarinah* evidence might still fulfill the standard of *yaqin* or beyond any doubt if a judge, based on such *qarinah*, is absolutely certain in convicting and sentencing the accused. It is simultaneously argued that a strong *qarinah* would be able to fulfill the standard of *zan al ghalib*.

There is an argument on whether or not *yaqin* carries the degree of absolute certainty in *hudud* and *qisas* convictions. Indeed there have been certain quarters who argue that the conviction on *yaqin* must be carried out in absolute and complete certainty. Hence, a judge can only convict an accused and sentence him with the highest punishment of *hudud* or *qisas* if he is absolutely certain (beyond any doubt) that the said accused is guilty of the offence. Such conviction and sentencing beyond any doubt means that the standard of *yaqin* has been met. Indeed this is in harmony with the hadith of the Prophet saw which rules out exclusion of *hudud* punishments in cases of doubt.

On the other hand, there have also been others who point out the fact that the status of absolute certainty or *yaqin* can never be achieved in either *hudud* or *qisas* convictions. Therefore it is argued that a judge could arrive at *hudud* and *qisas* convictions if he is reasonably certain of making such convictions. In other words, it is argued that the degree of *yaqin* in convictions of *hudud* and *qisas* cases does not signify conviction beyond any doubt, but rather beyond reasonable doubt or *zan al ghalib*. There are some truths in such a claim especially in cases whereby the judge has to rely on a strong *qarinah* in making a conviction and sentence in *hudud* and *qisas* cases. According to Mahmud Saedon A. Othman the fuqaha found that the status of *yaqin* in such cases does not mean that an alleged fact must be proven beyond any shadow of doubt. *Qarinah*, no matter how strong the evidence is, cannot achieve the degree of absolute certainty because it still carries some elements of doubt. Nonetheless, evidence by way of strong *qarinah* can achieve the standard of *al-zan al ghalib* or strong suspicion. Although in general *zan* or conjecture cannot be used to prove a fact, nevertheless in certain circumstances, strong *zan* reaching the stage of *al zan al ghalib* is acceptable in the absence of *yaqin* evidence (Saedon, 2003). The applicability of *al zan al ghalib* can be based from the authority of Al- Quran which states that:

“O you who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin” (Al- Quran,49:12),
(Yusuf Ali, 2005).

From this verse, it can be seen that not all kind of suspicion must be rejected. A strong suspicion like cases of *hudud* and *qisas* which conviction is based on strong *qarinah* should fall under the exception. It is believed that, this

would be the basis used by muslim Scholars especially the Maliki School that recognized the use of *qarinah* in proving *hudud* and *qisas* offences.

This research would like to offer an amicable suggestion to sort out the above entanglement on the issue of *yaqin* in *hudud* and *qisas* convictions. It is hereby suggested that the highest standard of *yaqin* must be fulfilled if any accused is to be convicted and sentenced with the highest degree of *hudud* or *qisas* punishment. In other words, the prosecution must prove the accused's guilt beyond any doubt so as to warrant him punishable by *hudud* or *qisas* punishment. This signifies that the judge should be absolutely certain in making the conviction and passing the said sentence. And this simultaneously means that the standard of *yaqin* or beyond any doubt has to be met in such conviction and sentence, making it to be in harmony with the hadith of the Prophet saw.

On the other hand, the standard of *zan al ghalib* should be used in *hudud* and *qisas* cases in which an accused is convicted of a lesser criminal offence and sentenced with an alternative punishment of a lesser degree. In other words, the prosecution should prove beyond reasonable doubt that the accused is guilty of a lesser offence which warrants him punishable by a lesser degree punishment. This means that the judge should be reasonably certain in making such conviction and passing such sentence. And this also signifies the fact that the standard of *zan al ghalib* or beyond reasonable doubt has to be proven in such conviction and sentence.

The whole issue of applicability and admissibility of *qarinah* in *hudud* and *qisas* cases should be scrutinized from a wider perspective. It is respectfully argued that *hudud* and *qisas* cases are not only about convictions and sentencing of the original and highest degree of *hudud* and *qisas* punishments. Rather these cases may also involve convictions and sentencing of alternative punishments of a lesser degree. It is argued that strong *qarinah* evidence may and should be made applicable and admissible in conviction and sentencing of *hudud* and *qisas* cases regardless of whether the accused is sentenced with the original *hudud* and *qisas* punishments (which degree of punishment is of the highest) or alternative punishments (which degree is considerably lesser). For instance, if the judge, in scrutinizing and assessing the *qarinah* evidence, finds that such *qarinah* strongly proves the accused's guilt, he may admit it. In such a scenario, if the judge, based on such strong *qarinah*, is absolutely certain of the accused's guilt, he may convict the accused and sentence him with *hudud* or *qisas* punishment. Such an instance proves that a strong *qarinah* may help a judge in conviction and sentencing of *hudud* or *qisas* punishments provided that the judge is absolutely certain of the conviction and sentence, signifying the fact that the burden of *yaqin* or beyond any doubt has been met. As regards to whether or not a strong *qarinah* evidence would help a judge to attain absolute certainty in conviction and sentencing of the original *hudud* and *qisas* punishments, it is respectfully argued that attainability of such certainty and conviction would always be possible. Academic debate on the achievability of such certainty and conviction could go on forever. However, at the end of the day, only a presiding judge would know whether or not he is absolutely certain in making the conviction and passing the sentence. In other words, only he would know whether or not the standard of *yaqin* or beyond any doubt has been attained. At any rate, a strong *qarinah* would definitely help the judge in convicting the accused of a lesser degree offence and sentencing him with an alternative punishment. Indeed, such strong *qarinah* evidence could help the presiding judge to achieve reasonable certainty in making the said conviction and passing a lesser degree sentence. Upon such conviction and sentencing, it could be said that such strong *qarinah* has fulfilled the standard of *zan al ghalib* or beyond reasonable doubt.

4.2 *Qarinah and its true strength*

The critics fail to realise the true potential and strength of a strong *qarinah* evidence. This is due to the fact that some quarters tend to gauge its strength by looking and assessing a particular *qarinah* evidence separately rather than gauging it collectively and corroboratively. It is admitted that *qarinah* evidence is insufficient if it is to be assessed individually and separately. Eventhough many ulama have viewed the *qarinah* of the pregnancy of an unmarried woman, or a liquorish smell coming from the mouth of a drinker as examples of a strong *qarinah*, the fact remains that such *qarinah* is still weak if uncorroborated by other evidence. Hence, a *qarinah* should be corroborated if it is to remain strong, applicable and admissible as an evidence. There is a view emerging which argues that the strength of a *qarinah* should be gauged from its collective and corroborative value and not otherwise. Only in such a manner can the strength of a *qarinah* evidence be demonstrated so as to ensure that it is in line with the concept of *qarinah al zahirah* or strong *qarinah* as propagated by Ibn Qayyim and other ulama (Ibn Qayyim, 1995; Zaidan, 1997; Saedon, 1996).

This research would like to demonstrate the strength of a *qarinah* evidence from the perspective of a DNA evidence. First of all, it is respectably argued that DNA evidence falls under the category of a *qarinah*. This is because DNA evidence could be found in samples such as finger prints, blood stains, sweat stains, seminal stains, skins, nails and strands of hairs taken from a person. In each of these samples, traces of DNA profile are found and used as evidence in

investigation and prosecution of criminal cases. Such samples play a major role in many criminal cases today as collectively and corroboratively it gives a distinct picture of an occurrence of an event and whether or not an accused is guilty of committing the said offence. Clearly such evidence is circumstantial in nature and falls under the ambit of *qarinah* which definition, scope as well and application have been well acknowledged by the contemporary ulama.' Evidence in forms of these DNA profiles is clearly circumstantial in nature and its corroborative presence is indeed capable of indicating the extent of crime commission and the suspect's involvement and guilt (Mazupi, 2014).

The relevancy and admissibility of DNA evidence could also be argued on the ground of its corroborative value. It is well known that *qarinah* could only be ruled as relevant and admissible should the evidence is adduced in its strongest form. And the strength of *qarinah* is gauged and determined not only by looking at every piece of evidence individually, but also by gauging its corroborative value collectively. Likewise, it is argued that DNA evidence will only become relevant and admissible in court once its corroboration is established. As it is, uncorroborated DNA evidence would have no evidential value at all. This is clearly in line with the relevancy and admissibility of *qarinah al zahirah* (strong *qarinah*) as emphasized and agreed upon by Ibn Qayyim and other ulama.

To further substantiate the strength of DNA evidence, an example is hereby illustrated. The process of gathering and collection of such evidence starts at the investigation stage. Each time when a crime occurs and direct evidence is absent, investigation will be centred on whether or not there is a presence of any kind of forensic evidence at crime scene. This is so as such presence would definitely indicate probability of whether or not a crime has occurred. It would also indicate the extent of a suspect's involvement and guilt. In investigations of illicit intercourse and sodomy cases, the investigation officer will collect evidence at the crime scene and send suspects (and victims) to approved hospitals for medical examination as soon as possible. This would allow related and unadulterated samples to be discovered and obtained at the earliest possibility. At the hospital, the doctor will, first of all, collect relevant samples from the suspect. These collected samples will then be put in a sealed and labeled container to avoid any tampering of proof. Based on his expertise and professional findings, the examining doctor will then write a report. The investigation officer will next send these samples to the chemist at the chemist department. Upon receiving these samples, the chemist will then open the seal of each container and conduct related tests on the samples. After completion of each test, he will place each sample into the original container. Each original container will then be placed in a new container and sealed as proof that specific tests have been conducted on these samples. Thereafter, the chemist himself will write his own report containing his findings based on all conducted tests. Last but not least, these samples will be placed back in the evidence room at the criminal investigation unit awaiting trial day. As a whole each time when an investigation is completed and the DNA evidence gathered is perceived to be credible, the investigation team would then decide on whether or not there is a strong case to proceed. In weighing this possibility, the investigation team would have to decide on whether or not all evidence gathered, including that of DNA evidence, are corroborative enough so as to indicate a very high degree of probability of the suspect's deliberate involvement in the crime. If so, the case will then be forwarded to the prosecution team for prosecution purpose (Mazupi, 2014).

During prosecution, any DNA evidence will be adduced in court through oral testimonies of the investigation officer, the medical officer and the chemist. Documentary evidence in forms of reports on findings by the experts will also be adduced. The prosecution would have to prove two things. Firstly, the prosecution would have to establish that the chain of evidence remains firmly intact throughout and that the credibility and integrity of the DNA evidence is not compromised. Secondly, it must also be proven that the DNA samples carry high corroborative values in proving the accused's guilt (Mazupi, 2014).

In proving the existence of chain of evidence, the prosecution must prove, through the oral testimony of the investigation officer, that the said sample has been properly gathered, deposited in container and sealed at the crime scene. If the nature of the case involves recovery of sample through medical examination (such as in illicit intercourse and sodomy cases), the prosecution must simultaneously prove through the oral testimony of the medical officer that the sample has been properly recovered from the body of the victim and that it has been properly deposited in container and sealed during the medical examination. Next, it must be proven that the sealed sample is brought back to the investigation office and kept safe in the evidence room. It must be further established that the sealed sample is later brought to the chemist at the chemist department. Next, the prosecution must prove through the oral testimony of the chemist that the sealed container containing the said sample has been received and opened and that the sample is brought out to be tested. Once the sample has been tested and its findings recorded, it must be proven that the said sample is placed back into the original container and thereafter the container containing the tested sample is placed into yet another container and resealed by the chemist. Last but not least, the prosecution must also prove that the new sealed container containing the said sample later finds its way to the court to be presented as an exhibit on trial day with the seal of the new container still intact and unbreached. In addition to proving the above chain of evidence, the

prosecution is also under the responsibility of proving, through oral testimonies and the experts' reports, that all DNA samples tendered during prosecution carry high corroborative values which collectively points to the accused's guilt (Mazupi, 2014).

Generally speaking, every stage of movement of the said sample together with their respective dates and times must be carefully and accurately recorded and established during trial. Only then would such forensic evidence be successfully adduced and its integrity established in court. And at the end of the trial, an accused will only be convicted upon proof of a firm corroboration between the forensic evidence and other available evidence, thus proving beyond reasonable doubt that the accused has deliberately committed the crime as charged (Mazupi, 2014).

The above example clearly illustrates the long process of how DNA evidence are gathered at the scene, tested by experts and finally presented in court as exhibits. The manner in which every detail, accuracy and credibility would have to be established proves the tedious process that every DNA evidence has to go through before such evidence can be adduced and later becomes relevant and admissible during criminal trial. This article therefore argues that a DNA evidence which has withstood the above stringent process is indeed corroborative and strong in the eyes of syariah evidential principles. Hence, such evidence may indeed become relevant and admissible under the principle of *qarinah al zahirah* as approved by the contemporary ulama' and that its strength and reliability should never be questioned.

All in all, it is extremely important to note the two important roles played by DNA and *qarinah* evidence in syariah criminal cases. First of all, the corroborative strength of such evidence would enable the syariah court to convict the accused for offences of the highest degree which warrant *hudud* and *qisas* punishments. This is in line with arguments of the ulama' which approve convictions of *hudud* and *qisas* punishments based on *qarinah al zahirah* or strong *qarinah* (Ibn Qayyim, 1995; Zaidan, 1984; Saedon, 1996) if the evidence corroboratively and cumulatively proves the accused's guilt beyond reasonable doubt. Alternatively, if the court, based on such corroborative evidence, senses a slight doubt in the case of the prosecution, the court may still convict the accused to a lesser degree offence which carries *ta'zir* or other alternative punishments (such as when the court reduces the conviction of an accused from murder to culpable homicide)(Paizah, 1991). Such are the important roles played by DNA and *qarinah* evidence in different degrees of convictions which may carry different punishments ranging from *hudud* and *qisas* punishments to lesser degree ones such as *diyath* and *ta'zir*.

4.3 Potential of *qarinah al zahirah* to be used as ground of judgment

This writing would also like to refute the claim that *qarinah* evidence can only become corroborative evidence but could never be used as a basis of judgment and conviction. Such misconception is clearly caused by their failure to understand the true nature and strength of strong *qarinah* or *qarinah al zahirah*. Had they understood the concept correctly, they would have realised that the strength of a *qarinah* (or DNA evidence, for that matter) should practically be gauged from its corroborative values collectively. Such evaluation of the strength of *qarinah* is clearly endorsed by Ibn Qayyim and other ulama'. Should the prosecution proves corroborative values of a *qarinah* evidence which he is adducing in his prosecution, it would further underline the very strength and reliability of such evidence. Hence, instead of being perceived as frail, weak and incapable of being considered as a ground of judgment and conviction, such *qarinah* evidence should, on its corroborative values, be regarded as solid and capable of being used by the court as a basis of judgment and conviction in all *hudud* and *qisas* cases.

5. Circumstantial Evidence under Man-Made Law

Under Common law, any facts in issue can be proved either by direct evidence or through evidence of circumstances. This is because not every time we are lucky to get witnesses who actually presence and saw a commission of a particular offence. In situation like this, circumstantial evidence will come forward and lend support to the case in the quest to uphold the justice.

Circumstantial evidence is defined as any fact from the existence of which the judge may infer the existence of fact in issue (Hamid Sultan bin Abu Backer, 2001). It is regarded as part of judicial creativity and courage in upholding justice. It is actually refers to evidence of inference from the established facts. The nature of circumstantial may be quite weak leading to various inferences being drawn if it is standing on its own (M. Peters, 2003). However, if more than one fact is taken together it will create strong evidence that leading to an inference or presumption of the principal fact.

The application of circumstantial evidence is explained in no better words than in the celebrated case of *Sunny Ang v Public Prosecutor [1967] 2 MLJ 195*, circumstantial evidence is evidence where the cumulative effects of all create the irresistible conclusion that the accused committed the crime. In simple word, it refers to a congregation of evidence

that point to the guilt of the accused.

Circumstantial evidence could be anything that surrounded in a particular case as long as it is relevant, connected to the case and not too remote. It could be in the form of corroborative evidence, knowledge or even conduct of a particular person that when taken together will lead to the conclusion that the accused is guilty.

However, it must be noted that evidence of inferences need to be applied with great caution. It should only be used when it leads to single inference not in occasion where more than one inference could be made. Let say, from the same established fact two inferences can be made, one that discriminate the accused and the other showing possibility of innocent, the law provides that inference in favour of the accused should be applied. As such benefit of the doubt should be given to the accused (*Tai Chai Keh v Public Prosecutor [1948-49] MLJ Supp 105; Public Prosecutor v Kasmin Bin Soeb [1974] 1 MLJ 230*). This is the general principle applied under the conventional criminal law which operates as a safeguard to the accused against any miscarriage of justice.

Another important feature under Common Law approach is that there is no dichotomy on the burden of proof that should be applied when the case is relying either on direct evidence or circumstantial evidence. The burden of proof in criminal cases is proof beyond reasonable doubt. Lord Denning (as His Lordship was then) had explained what is meant by proof beyond reasonable doubt. His Lordship said that it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community of it admitted possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice (*Miller v Minister of Pensions [1947] 2 ALL ER 372*).

When the evidence in the case is solely depending on circumstantial evidence, the Judge needs only to consider whether or not the circumstantial evidence adduced had sufficiently proven the guilt of the accused beyond reasonable doubt. Abdoolcader FJ in *Dato' Mokhtar Bin Hashim v Public Prosecutor [1983] 2 MLJ 232, p 275*, had explained that when the prosecution case rely on circumstantial evidence, failure by the Court to say that the evidence proved must irresistibly point to one conclusion which is the guilt of the accused, does not fatal if the Judge merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt. The effect from the judgment is that, burden of proof beyond reasonable doubt can still be disposed off or satisfied by using circumstantial evidence. There is no issue the effect of circumstantial evidence unable to reach degree of proof beyond reasonable doubt.

6. Conclusion

It is extremely important to dispel any misconception on admissibility of a strong *qarinah*. This research humbly submits that *qarinah* is a legitimate type of evidence under syariah principles of evidence and even can be used in cases involving *hudud* and *qisas* offences. The best example is how it was used in resolving defamation alleged against Prophet Yusuf A.S. However it is also important to stress that only a strong *qarinah* can become admissible. Whether or not a strong *qarinah* may help a judge in convicting an accused, and whether an accused can be sentenced to the original *hudud* or *qisas* punishments or the alternative punishments, will depend on the actual strength and admissibility as perceived by the said judge. And as argued and pointed out in this research, the question of strength of a *qarinah* evidence should be gauged collectively and corroboratively. Hence it is extremely pertinent for a judge to exercise his discretion by looking at the circumstances as a whole.

In conclusion, a strong *qarinah* may become an important tool in convicting an accused with a *hudud* or *qisas* offence if the standard of *yaqin* is fulfilled. On the other hand, if such *qarinah* fulfills the standard of *zan al ghalib*, chances are the accused may be sentenced with an alternative punishment. However if such *qarinah* fails to meet either standard of proofs, it is humbly submitted that an accused may be acquitted without any punishment at all. This is also parallel with *hadith* of Prophet Muhammad S.A.W which stated that "Avoid punishments so long as there is room for avoiding them," "Keep the Muslims away from punishments wherever possible and If there is any way out for an offender to escape punishment, acquit him" (Narrated by Trimidhi) (Quraishi, 2001).

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