

APPRAISAL OF EVIDENCE AND WITNESSES REQUIRED FOR THE PROOF OF THE OFFENCE OF ADULTERY (ZINA) AND RAPE IN ISLAMIC LAW

BY;

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ABSTRACT

Adultery (zina) is one of the seven (7) Hudud¹ (prescribed) offences in the Islamic Criminal Justice System (Jinayah). This paper critically appraised the legal requirements of witnesses and evidence needed to prove an allegation of zina. It had further addressed a wide spread misconceptions of the burden to be discharged by the prosecution in proving an allegation of adultery under Islamic Law. The evidence to be used by the court of law must satisfy some basic requirements, so also the witnesses who will present the said evidence in court.. It is crystal clear that some states in the northern Nigeria had re-introduced the Islamic Criminal Justice System by enacting the Penal Law of Northern Nigeria and re-enacting the Shariah Penal Code Laws of various couple of years ago. This paper had thus, looked at a cross section of the Shariah compliant states in the Northern Nigeria It is however, the finding of this paper among other findings, that Islamic rules of evidence and procedure were carefully designed to protect human dignity.

Key Words: Witnesses, proof, offence, adultery, Islamic Law.

1. Introduction

Certain practices in Islamic Law were criminalized by the Almighty Allah in the glorious *Qur'an* and their punishments were accordingly prescribed in the *Qur'an*. Adultery (Zina) is one of those

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¹ Offences that are defined in the Holy Quran, or sunnah and their punishments are also contained in the Holy Quran or the Tradition of the Holy Prophet (SAW)

practices that the Almighty Allah had criminalized the offence of adultery in order to protect and safeguard human dignity.² There is perhaps wide spread misconception about the rationale behind the application of very severe punishment for the offence of zina, but the reasons for the *Hadd* punishments of stone to death in respect of a married person who committed *Zina*, and eighty (80) stripes of cane for an unmarried person, are attributed to the impotence attached to the marriage institution, and the protection of lineage in Islamic law.³ Despite the severity of the punishments of *zina*, the evidential requirements imposed on the prosecution before securing conviction are also difficult to prove. Justice is therefore the underlying motive behind the strict procedure laid down in order to secure conviction. In any case, if an allegation was validly made against an accused person for the commission of *zina*, and the prosecution failed to meet up with the evidential requirements for *Hadd* punishment to apply, the judge may apply *Ta'azir* punishment depending on the circumstances of each case

2. Means of Proving the Offence of Adultery under Islamic Law.

There are essentially three (3) means of proving the allegation of Zina under Islamic law that is to say; by confession, testimony of witnesses and manifestation of pregnancy. Another separate means of resolving the allegation of adultery under Islamic law is by oath of mutual implication (*Li'an*).⁴

3. Evidence by Witnesses.

The proof of the offence of zina by testimony suggest that the evidence of four (4), males, Muslims and eye witnesses who witnessed the act of zina is required to establish zina by testimony.⁴ Allah the Almighty by His wisdom sets some sanction for the person who alleges adultery against another person but failed to prove same by four (4) witnesses. Allah says in the glorious Qur'an. "And those who cast allegation of adultery against chaste women and produces not four (4) witnesses (to support their allegation) flog them with eighty stripes."⁵

4. Conditions of Witnesses.

Some conditions are set out by law regarding both the persons that gave evidence and the piece of evidence itself. The conditions include:-

2 Al Hilali, Mz. T. and: Muhsin, M. K. Translation of the meaning of the Noble Qur'an in the English Language, King Fahd Complex for the Printing of the Holy Qur'an **Q 42 v 35**

⁴ Shabbir, Muhammad. Outlines of Criminal Justice in Islam. International Law Book Services. Java . **P. 66**

⁵ Al Hilali, Op Cit.Q 24 : 4

i. The Witness Must have the Power of Speaking and seeing.

A witness that will testify in proof of the allegation of *zina* must have the ability to speak and see. Thus the evidence of dumb and deaf person is not admissible in the matter of *zina*, even if his signs are so intelligible,⁶ or he make the evidence in writing but if the evidence is made in writing, it can be accepted for *Ta'azir(discretionary)* punishments. This is the opinion of Imam *Abu Hanifa*. According to *Imam Malik* and *Ahmad* however, he can reduce it to writing and in such circumstances the evidence will be accepted even for *Hadd* punishments.⁷

Similarly, the evidence of a blind person is not acceptable in *Hudud* Offences. This is the *Ijma* (unanimous opinion) of the jurists.⁸

ii. The Witness must be. Credible (*Aadil*).

It is a requirement under Islamic law that every witness must be *Aadil* (credible). *Aadil* in respect of Islamic criminal law is a Muslim who does not commit major sins.⁹ Different opinions were held by different jurists on the meaning of *Aadil*, however according to *Imam Malik*, *Shafi'y* and *Ahmad*, credibility (*Adala*) of a witness has to be inquired by the court even if it has not been challenged.¹⁰

iii. A Witness must be Muslim

The Muslim jurists are unanimous (*Ijma*) on the position that a non-Muslim can never testify against a Muslim in the matter of *Hudud*, however, they differ on whether a non-Muslim can testify against another non-Muslim. According to *Abu Hanifa*, he can testify against a non-Muslim even in respect of *Hadd* punishments.

iv. A Witness must be Male.

According to the majority of the jurists, all the four (4) witnesses must be males for the proof of the offence of *zina* subject to *Hadd* punishment. According to *Imam Zuhuri*, women were never allowed to testify in respect of *Hudud and Qisas* (law of retaliation) offences, since from the time of the Prophet up to the time of the rightly guided Calliphs.¹¹ But *Ibn Taymiyyah* and *Ibn Hazam* held that evidence of women is not rejected even in matters of *Hudud* and *Qisas*.¹²

⁶ Anwarullah, *The Criminal Law of Islam 3rd edition A S Noordeen publishers Kola Lumpor Malesia (2008)* P.145

⁷ Ibid.

⁸ Ibid P. 145

⁹ Ibid P. 146

¹⁰ Ibid

¹¹ Ibid. p. 148

¹² Ibid. p. 149.

v. The Witness must be adult.

The witnesses in general under Islamic law must be adults the Prophet of Allah was reported to have said: “Three (3) persons are exempted from any liability, namely;

- a. Minor until he attains puberty.
- b. The sleeping person until he wakes up.
- c. Insane until he attains sane.¹³

The jurists concur that the witness must be adult and sane both at the time conceiving the evidence and at the time of rendering testimony in court.¹⁴

vi. Evidence must be Direct.

The evidence required in the proof of zina capable of attracting *Hadd* punishment must be direct, meaning the witness must have observed the occurrence of the offence himself. Thus indirect evidence or hearsay evidence is not admissible in proving zina liable to *Hadd*, however, such evidence may be considered for *Ta'azir* punishment depending on the nature of the allegation¹⁵

vii. The Evidence must not be Delayed

The evidence required for the proof of zina liable to *Hadd* must not be delayed for a considerable time; such delay may raise doubt which will remove the *Hadd* punishment. This is the opinion of *Imam Abu Hanifa*, he based his opinion on the saying of *Umar Ibn Khattab (RA)* that “Those who don’t give evidence at the time of the occurrence of the offence and then give evidence of that offence after long time; their evidence is based on malice”¹⁶

viii. Evidence not to be based on Personal Interest of the Witness.

The evidence of a person who has interest in the matter against the accused person that is to say he is an enemy of the accused person or he is related to the victim that alleges the offence. The Prophet of *Allah* was reported to have said. “The evidence of a suspicious and spiteful person is not admissible.” In another *Hadith*, the Prophet said; “The evidence of traitor, traitress, adulterer, adulteress and rancorous is not acceptable.”¹⁷ The Prophet said: “remove Hudud if there is

¹³ Shaukani, Muhammad Ibn *Ali Nail al-Adar*. Ibid. p. 145

¹⁴ Ibid.

¹⁵ Ibid

¹⁶ Ibn Hazam, *Sharh Fath al-Qadir Anwarullah*, Op Cit. p. 150

¹⁷ . Ibid.

doubt.”¹⁸ Thus, if there is any doubt in any part of the evidence in respect of *zina* liable to *Hadd*, *Hadd* punishment must be set aside, *Ta’azir* may apply.¹⁹

ix. Quantum of Evidence.

Four (4) witnesses are required for the proof of *zina* liable to *Hadd*, however if their number is less than four, *Hadd* punishment shall not be applied rather *Ta’azir* will apply if the evidence so adduced is authentic.²⁰

It is pertinent at this juncture to mention that according to *Imam Abu Hanifa, Malik and Zaidi Shi’a* if the number of witnesses is less than four in an offence of *zina* liable to *Hadd*, the witnesses will be punished with a *Hadd* penalty of false accusation of *zina* (*Qazaf*). They based their view on the practice of *Umar Ibn al Khattab (R.A)*: in the case of *Mugitah Bin Shu’abah* who was accused of committing *zina* by *Abu bakarah, Nafi’ah and Shibal* and they gave evidence that they have seen him making sexual intercourse with a woman named *Ummi Jamil*, but the fourth witness by name *Ziyad* did not give such evidence. He said the identity of the woman can neither be confirmed nor can the sexual intercourse also be confirmed. *Umar* punished *Abu Bakarah, Nafi’ah and Shabil* for the *Hadd* of *Qazaf* (false accusation of *zina*) and discharged *Mugirah Bin Shu’abah* for want of evidence.²¹ They also rely on the Qur’anic verse where Allah says: . “And those who cast allegation of adultery against chaste women and produces not four (4) witnesses (to support their allegation) flog them with eighty stripes.”²²

x. Evidence must be of Penetration.

The evidence required for the proof of *zina* liable to *Hadd*, must be an evidence of penetration and the statement of the witness must be explicit as to the penetration there must not be any contradiction on the statement of the witnesses as to the penetration, time and place.²³ The judge shall ask all these questions and get himself satisfied if there is any contradiction in the statement of the witnesses, the *Hadd* punishment shall not be applied.

xi. Witness must not be a Person Punished for HaddOffence.

¹⁸ Al Baihaqi, *Sunan al kubra*. Vol iii p. 258 Ibid. P 150

¹⁹ Ibid

²⁰ Ibid. P. 151

²¹ Ibn Qudamah, *Ilmu al Muaqqin*. Ibid p. 151

²² Al Hilali, *Op Cit*. Q 24 : 4

²³ Al San’ani, M. I. . ‘*Subl al Salam’*. Anwarulla, *Op Cit*. P. 163.

A witness in the offence of *Zina* liable to *Hadd* must not be a person that has been punished with *Hadd* of *Qazaf*. Allah says in the concluding part of the above cited verse, “.... And reject their evidence even after”²⁴

xii. Judge not to Decide on his Own Evidence

According to the majority of the jurists, the judge is not allowed to consider his own evidence together with the remaining three witnesses. There must be four independent witnesses other than the judge to prove the offence of *zina* liable to *Hadd*.²⁵ punishment

xiii. Retraction of Evidence.

It is possible for a witness to retract his evidence in an offence of *zina* liable to *Hadd* punishment at any time before the execution of the punishment. If any witness retracted his evidence before the execution of the punishment and the remaining witnesses are less than four, the accused will be discharged for *Hadd* penalty, and the rest may be punished for the offence of false accusation of *zina*.²⁶

xiv. Procedure of Receiving Evidence of Witnesses.

Under Islamic law, if the witnesses that seek to give evidence of the commission of *zina* against the accused persons comes to testify the following procedure shall be adopted by the court in receiving their evidence.²⁷

- A. The witness's shall all be brought to court at one time.
- B. The witnesses after indicating their interest to give evidence shall all be ordered to go out of court and out of hearing.
- C. Each of the four witnesses shall be ordered to stay away from one another outside the court.
- D. One neutral person shall be appointed to monitor each witness outside the court.
- E. The court will start inviting the witnesses one after the other and the court will start asking the them the following questions;-
- F. Did you see the penis of the accused person in to the vaginal of the woman?
- G. Whether you saw the man on top of the woman or the woman on top of the man?
- H. Whether you stand by her legs or towards her head?

²⁴ Ibid

²⁵ Ibid.. P.154

²⁶ Ibid.

²⁷ Mansur Ibrahim Sa'ad 'Islamic Criminal Law and Practice in Nigeria' Usman Dan Fodio University Printing Press 2011. P. 10

- I. Whether they were on a bed or on the floor?
- J. Whether both the parties were naked and they were not covered?
- K. If they were covered what was the nature of the cloth covering them?
- L. Was it inside the room or outside the room?
- M. Was it in the morning, afternoon or night?

5. **Confession *Iqrar***

Under Islamic law confession, by the accused is always the best evidence in the eyes of law. This position is represented in an Arabic maxim; thus; '*al iqrar aulah minash shuhoud*' meaning confession is by far better than witnesses.²⁸ Allah says in the glorious Qur'an; "Let him who incurs the liability dictate (admit) but let him fear his lord Allah and not diminish aught of what he owes."²⁹ In another vein, the prophet of Allah was reported to have said; "Speak the truth even if it is against yourself."³⁰

6. **The Essential Components of Confession.**

There are basically three(3) components of Confession under Islamic law.

- a. The formula (*sigha*).
 - b. Place of Confession (*mahl ul Iqrar*)
 - c. The acknowledger (*muqirr*).
 - d. The person in whose favour the acknowledgment is made (*muqirr lahu*).
- a. **The Formula:** the formula of making confession is that it can either be orally, in writing or by gesture. In a situation where by the maker of the Confession is a dumb person, his gesture is acceptable. However, majority of the scholars held that silence cannot amount to confession in Islamic criminal law.³¹
- b. **Place of Confession:** the admission of an offence liable to *Hadd* must be in the court, any other confession in matters of *Hadd* outside the court is not admissible.³²
- c. **The acknowledger (*muqirr*):** the acknowledger should satisfy the following requirements:-
- 1. He should be adult.
 - 2. He should be sane.

²⁸ Muhammad Lawal Dabo.. '*Rules and Principles of Confession (Iqrar) in Islamic Law.*' Journal of Islamic and Comparative Law, Center for Islamic Legal Studies Ahmadu Bello University Zaria. Nigeria. 2007 P.76.

²⁹ Al Hilali, Op Cit. Q 2 : 282.

³⁰ Narrated by Buhari. Ibid.

³¹ Ibid 78

³² Ibid.

3. He should make the confession voluntarily.
4. He should at that time be in a stage of consciousness.
- d. The confession must be explicit to the commission of the offence. The judge has to put question to the confessor as was done by the Prophet (PBUH) put questions to Ma'iz bin Malik.³³ The confession has to state that he commit sexual intercourse with the woman.³⁴

According to Imam Abu Hanifa and Ahmad, the confessor in a matter of zina liable to Hadd must make four separate confessions, however to Imam Malik and Shafi'y only one confession is sufficient. .³⁵

- e. The confession is a proof against the confessor only, it should never be used against the co – accused. It is either for the co – accused to confess against himself, or the offence be proved against him by witnesses. If the confession by one accused is anything to go by, against the co – accused, it can only raise a presumption which may attract ta'azir and not Hadd penalty.³⁶

7. Compulsory Confession.

Under Islamic law, if any person was compelled to confess to the commission of any crime, such confession is inadmissible in court. This is however the general rule, few instances may exist in cases of theft.³⁷

8. Retraction of Confession

Under Islamic law, a person who has been convicted based on his own voluntary confession, has the right at any stage before the execution of the punishment, withdraw his confession in the reported case of Ma'iz bin Malik, when he was to be executed, he tried to run away but people held and stoned him to death. When the Prophet was informed about the Ma'iz's attempt to run away and he was denied the Prophet said; "Why don't you let him run away and retract and get rid of the punishment?"³⁸

Further, according to Imam Abu Hanifa, Malik and Ahmad, retraction must not be properly made. That is to say if the confessor merely ran away, it is enough retraction.³⁹

9. Manifestation of Pregnancy in an Unmarried Woman.

³³ Ibid

³⁴ Ibn Qudamah, Anwarullah Op Cit. P.157

³⁵ Ibid.

³⁶ Muhammad Lawal Dabo.. Op Cit. P.80

³⁷ Muhammad Sadiq Abubakar . 'Some Principles of Islamic Law of Evidence' *Murafa'at. Op Cit P. 50.*

³⁸ Anwarullah, Op Cit. p. 154

³⁹ Ibid.

Under Islamic law, is it not a conclusive proof that if a pregnancy manifest on an unmarried woman, she commits zina liable to Hadd? There are differences among the Islamic jurists. According to Umar (R.A) manifestation of pregnancy in an unmarried woman is sufficient evidence for the offence of zina liable to Hadd, this view was adopted by Imam Malik, but majority of the jurists do not agree with this view. They insisted that such serious punishments should either be based on witnesses or on the confession of guilt.⁴⁰ One of the principles of Islamic law is that the benefit of doubt should be resolved in favour of the accused person, the Prophet was reported to have said; “Avoid punishing whenever you find scope for it.” The Prophet also said; “Try to avoid punishing Muslims whenever possible and if there is a way for an accused person to escape punishment, let him off. An error of a judge in letting off an accused is better than an error in punishing him.”⁴¹

According to Islamic law if pregnancy manifests on an unmarried woman and she confesses to the commission of zina, she should not be questioned about the other party if she does not mention his name because it is not the aim of Islamic law to see people been punished indiscriminately.⁴² But where she mentioned his name the other party should be questioned and if he denied he should be set free provided there is no evidence to support it.⁴³

10. Claim of Rape against a Man.

The position of Islamic law is that if a claim of rape was laid against a man by an unmarried woman, the court shall take his plea, if he confesses; the court shall punish him for Zina liable to Hadd.⁴⁴

However, where the suspect denied the allegation, so many issues come to play. How does the court proceed? Is the suspect to be interrogated or not? Is he to be called upon to take an oath? Can the woman be said to have defamed the suspect since she has no reliable evidence? What is the weight of circumstantial evidence surrounding the case? At what time did the victim report the incident? The matter became complicated because of the circumstances of the case, jurists have

⁴⁰ Ibid,

⁴¹ Ibid P. 156

⁴² Ibid.

⁴³ Afzalur Rahman, 'Encyclopedia of Syrah'. Vol. 11 p. 791 Ibid. p. 155

⁴⁴ Uthman, M. B. "*Criminal Evidence: Proof of Capital Offences*" *Journal of Islamic and Comparative Law* Ceter For Islamic Legal Studies AB U Printing Press Zaria . (2010) P. 28.

categorized the matter in to three (3) brood categories all depending on whether the woman reported the incident on good time or not.⁴⁵

i. Where the Man Accused of Rape is a Person of Good Character.

If the woman's claim is made after a delay, (which could be long or short), a presumption of defamation is raised, and she would suffer eighty (80) stripes of cane for her false charge, and also the Hadd for zina because of her pregnancy⁴⁶ unless she retracts her statement.

The accused shall not be caused to take oath to relive him of the liability to pay dower. On the other hand if the woman is of good reputation, the jurists differ. One opinion says that the man shall be compelled to pay Sadaq (dowry) and will not be given the chance to take an oath to relive him of the liability to pay Sadaq.⁴⁷

However, the more preponderant view of the Maliki School is that if both the woman/victim and the man/suspect are of good reputation, there is no difference of opinion among the jurists as to the rule that nothing is proved against the man and that the woman shall be given the Hadd for the defamation. She shall also be given the Hadd for zina if pregnancy ensures, and if pregnancy does not arise, then the Hadd for zina is not due.⁴⁸

In assessing the two views, one is easily inclined to the preponderant opinion of the Maliki School because it may not be proper just because one is of good reputation then the court will close its eyes from the strong circumstantial evidence against him.

ii. Where the Woman Reports the incident in Good Time.

In this case the woman will escape the Hadd for zina but she will be given the Hadd for defamation. The arguments for the circumstantial evidence given in 3.7.2 above are even more cogent here.⁴⁹

b. Where the Man's Reputation is not known and the Matter is reported after a Delay.

The Hadd of zina will not apply to the accused as the allegation is not established. The woman will be given Hadd punishment for defamation. If the pregnancy manifests she will be given Hadd for zina unless she retracts her statement.⁵⁰

i. Where the Woman is of Good Character.

⁴⁵ Ibid.

⁴⁶ Ibid

⁴⁷ Ibid.

⁴⁸ This is the view of Ibn Rushid as reported by Al – Tusuliy in the Bahjah, vol. 22 P. 365. Ibid.

⁴⁹ Ibid. O. 30

⁵⁰ Ibid P. 35.

There are differences of opinion among jurists as to whether the Hadd of defamation and zina will apply to her, and infect this case depend on the peculiarity of each case based on its own special circumstances.⁵¹

ii. Where the Woman Reports Promptly Without due Delay

If she is of good character, she shall escape the Hadd of zina and defamation; the jurists are unanimous over this rule. Where she is not of good reputation, the jurists have differences of opinion over this rule⁵² in this type of case whenever the woman avoids the Hadd of zina and defamation, the accused will have to take an oath to relieve him from paying dowry and if he refuses, the woman shall take oath and claim her dower.⁵³

c. Where the man is of bad character.

The rule here is that the woman will not be given the Hadd punishment for zina whether she reported promptly or not as long as she is not pregnant.⁵⁴ If there is pregnancy, the jurists have differ, there also a difference of opinion over her entitlement to dower. According to Ibn al – Qasim she is not entitled to dower just for mere allegation, even if the suspect is devilish. According to Maliki jurist she should be entitled to dower without being caused to take an oath.⁵⁵ Ibn Rashid held that the suspect should be subjected to thorough investigation while in detention; it is only when nothing is proved, then he will be given the chance to take an oath to relieve himself from the payment of dower.⁵⁶

11. Parties to Zina must be Sane and Adult (*Muhsin*).

One of the basic conditions required to establish the offence of zina liable to Hadd is that the parties must be Muhsins; ihsan literarily means fortress, protection, inaccessibility and in terms it means sexual intercourse of an adult and sane man and an adult and sane woman during a valid marriage. If a man marries a wife but he is yet to have sexual intercourse with her, he shall not be regarded as Muhsin for the purpose of punishment of zina and shall be liable for the punishment of hundred stripes if they commit zina.⁵⁷ Similarly, if a man marries irregularly for example marriage without witnesses or marriage during Iddah from her previous husband and he makes sexual intercourse

⁵¹ Ibid.

⁵² Ibid

⁵³ Ibid. P. 31.

⁵⁴ Muhammad Bello Usman Op Cit. P 30

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Anwarullah, Op Cit. P. 118

with her, he shall be considered Muhsin. In the same vain, if a man makes intercourse with his minor or insane wife, he shall not be considered Muhsin.⁵⁸ According to *Abu Hanifa, Mailik Shafi'iy, Ahmad* and some Shi'a jurists, if a man validly married a wife and has sexual intercourse with her, he becomes Muhsin even if he subsequently divorces her. The same thing also applies to a woman⁵⁹

12. Conclusion.

There were carefully designed rules of evidence and procedure in establishing the offence of adultery under Islamic law which were explained in detail in order to achieve the ultimate aim of the law which is justice. However, inadequate consultation of Islamic texts is exposing so many writers to pervasive conclusions about the requirements of evidence needed to secure conviction in the matters of zina under Islamic law which this paper had addressed.

findings

- a. The punishments for zina is undoubtedly harsh, which perhaps may be the main reason for wide spread misconception about the justice of the Islamic law of zina.
- b. Many people don't create time to read the original texts of Islamic criminal law, which may go a long way in creating misleading opinions about Islamic law of zina.
- c. The severity of the punishments for the offence of zina is a great deterrence to others.

Recommendations

- a. Scholars should write enough literature on this topic and in a plain language to reduce the wide spread misconception about Islamic Law of zina which will certainly curtail crime rates in the society.
- b. People should have a reading habit as against the conventional practice of over reliance on social media.
- c. Implementation of Islamic punishment of zinna will certainly curtail crime rates in the society

⁵⁸ Ibid.

⁵⁹ Ibid.