

PROSECUTION OF RAPE IN ISLAMIC LAW: A REVIEW OF PAKISTAN HUDOOD ORDINANCE 1979¹

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ABSTRACT

There has been some confusion over prosecuting rape in modern Islamic legal studies. A question has arisen: should the Islamic court treat the case of rape, in regard of convicting and proving rape, by imposing the same jurisprudential provisions, requirements and legal proceedings as in the case of zinā on the ground that rape involves elements of illegal intercourse similar to zinā? As such, should the rape victim who complains about rape be charged with qadhif if there is insufficient evidence? This article examines the notions of the prosecution and the required evidence for both rapist and rape victim in Islamic criminal law with special analytical analysis on the Pakistan Enforcement of Hudood Ordinance 1979.

Keywords: Prosecution, rape and Islamic law

¹ This is an improved and modified version of a paper presented at BRISMES Annual Conference 2004 “Domination, Expression and Liberation in the Middle East,” 4-7 July 2004, SOAS.

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The prosecution of rape is complicated because it involves violence, oppression as well as elements of *zinā* in terms of sexual intercourse. At the same time also it contains forcible usurpation against individual personal dignity. The problem arises in some modern Islamic courts as to whether or not to adopt the same standard of proof for prosecuting rape as is required for convicting *zinā*.

In Pakistan, the legal system has provided the same standard of proof requiring the testimony of four male witnesses. As a result, many rape offences fail to be convicted for lack of witnesses. In the Offence of *Zinā* (Enforcement of Hudood) Ordinance, 1979, section 8 provides that the proof of *zinā* (adultery or illegal sexual intercourse) or *zinā bi al-jabr* (rape) liable to *ḥadd* is either by confession of the accused or the testimony of four male adult witnesses.³ Worse than that, sometimes the court has concluded that intercourse was therefore consensual, and consequently has charged rape victims with *zinā*.⁴

Given the assumption that an allegation of rape is an admission of sexual intercourse, the dismissal of the prosecution case amounts to an implied confession of adultery. In 1985, Safia Bibi, a sixteen year old, nearly blind domestic servant, reported that she was repeatedly raped by her employer and his son, and became pregnant as a result. When she charged the man with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with *zinā* for not having conclusive evidence to show that the unexplained pregnancy was because of rape. The Sessions court at Sahiwal convicted her for *zinā* and sentenced her to 3 years rigorous imprisonment, 15 lashes, and a fine of Rs.1000/-. (*Bibi v. State*, 1985 P.L.D Fed. Shariat Ct.120).

DEFINING RAPE

Rape has been defined as a forcible sexual intercourse by a man with a woman who is not legally married to him, without her free

³ See M. Waqar al-Haq, *Islamic Criminal Laws (Hudood) Laws and Rules with up to Date Commentary*, Lahore: Nadeem Law Book House, 1994, 151.

⁴ See Asma Jahangir and Hina Jilani, *The Hudood Ordinances: A Divine Sanction?*, Lahore, Rhotas Books, 1990, 88.

will and consent.⁵ The terms *ghaṣaba* and *ighṭaṣaba* have been used by traditional jurists to express the meaning of sexual assault.⁶ The jurists also use a direct conclusive legal definition of rape, that is, *al- ikrāh 'alā al-zinā*.⁷

Based on the general rules for convicting *zinā*, the testimony of four eyewitnesses or a criminal confession is the only way of conviction which leads to severe punishment of stoning to death or flogging by one hundred lashes. To convict a person for the offence of *zinā* through eyewitness testimony is almost impossible. Throughout history, no one has been convicted of *zinā* by the testimony of four witnesses. Circumstantial evidence in the absence of direct and positive evidence about penetration does not constitute the offence of *zinā*. Circumstantial evidence may be used as corroboration but cannot be made the basis of conviction for *zinā*.⁸

One can argue that the requirements of a strict standard of proof and its exigencies are precisely to prevent carrying out the severe punishment which could be recovered by sincere repentance. By limiting conviction to only those cases where four reliable and religious male

⁵ Mālik Ibn Anas, *al-Mudawwanah al-Kubrā*, Cairo: al-Sa'ada Press, 1905, vol. 4, 401. Abū Abdillāh Muḥammad ibn Muḥammad Abd al-Rahman al-Hattab, *Mawāhib al-Jalīl*, 2nd edn. Beirut: Dār al-Fikr, 1398 AH, vol. 6, 294, al-Kāsānī, 'Ala' al-Dīn (587H). *Badā' i' 'al-sana' i'c* 2nd edn. Beirut: Dār al-Kitāb al-'Arabi, 1982, vol. 7, 181, Maṣṣūr ibn Yūnus ibn Idrīs al-Bahūtī, *Kashshāf al-Qinā'*, ed. Hilāl Musailahi, Beirut: Dār al-Fikr 1412H, vol. 6, 97.

⁶ Mālik for example uses the term *ghaṣaba* in his book *al-Mudawwanah al-Kubrā*, when he discusses rape and its punishment. See Mālik ibn Anas, *al-Mudawwanah al-Kubrā*, vol. 16, 213 & 361; In his book *al-Mughnī*, Ibn Qudāma (a famous medieval Syrian Hanbalite scholar) also uses the term *ghaṣb* when discussing the invalidation of fasting. Among the cases is that of a woman who has been raped (*ghaṣabahā rajulun*). According to him, the ruling was that her fast had been invalidated and she had to make up that day. See, al-Maqdisi, Abdullah ibn Muhammad ibn Qudamah (d. 620), *al-Mughnī*, Beirut: Dār al-Fikr 1405H, vol. 3, 27–28.

⁷ Ibn Qudāma, *al-Mughnī*, vol. 10, 158–159; al-Bahūtī, *Kashshāf al-Qinā'*, vol. 6, 79; Shams al-Dīn Muḥammad ibn Aḥmad al-Sarakhsī, *al-Mabsūṭ*, Beirut: Dār al-Ma'rifah, 1993, vol. 24, 88.

⁸ M. Waqar al-Haq, *Islamic Criminal Laws*, at 128.

individuals who actually saw with their own eyes, sexual penetration taking place, the crime will realistically only be punishable if the two parties had committed the act in public. Thus, the rationale behind the harsh penalty is to deter public aspects of this form of sexual practice.⁹ The crime is therefore really one of public indecency in addition to private sexual misconduct.

As such, it can be suggested that there is no valid justification for applying those evidentiary restrictions in forcible sexual assaults. Rape is an indecent aggression against a person's honour, not a personal sin. It is very hard to convict a culprit who cruelly commits rape with four eyewitnesses. It is not appropriate to apply the same mechanism of conviction and the same strict standard of proof for crimes of two different natures. There are some arguments to support this suggestion.

CLEAR NAŞ (TEXTUAL EVIDENCE)

The texts of the Qur'ān and Sunnah admittedly cover all events either explicitly or through indirect indication. There are explicit *nuṣūṣ* proving that rape has a different conception compared to *zinā* especially in terms of proving the existence of rape.¹⁰

For example, 'Abd al-Jabbār Ibn Wā'il reported that during the time of the Prophet, a woman was raped and she was excused from punishment. "When a woman went out for prayer, a man attacked her and raped her. She shouted and went off, and when a man came by, she said: "That man did such and such to me." And when a company of Anṣār came by, she said: "That man did such and such to me." They

⁹ Bassiouni, M. Cherif, "Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System." *In The Islamic Criminal Justice System*, M. Cherif Bassiouni, ed., London: Oceana Publication, 1982.

¹⁰ According to Shāfi'ī, Aḥmad and one view which is attributed to Abū Ḥanīfah, whenever there is a *naṣṣ* on a matter, *qiyās* is absolutely redundant. *Qiyās* is only applicable when no explicit ruling could be found in the sources. Since recourse to *qiyās* in the presence of *naṣṣ* is *ultra vires* in the first place, the question of the conflict arising between the *naṣṣ* and *qiyās* is therefore of no relevance. See Abū Zahrah, *Uṣūl al-Fiqh*, 200.

went and seized the man whom they thought had had intercourse with her and brought him to her. She said: "Yes this is the one." Then they brought him to Allah's messenger. When the Prophet was about to pass sentence, the man who had assaulted her stood up and said: "Apostle of Allah, I am the man who forced her against her will." The Prophet said to the woman: "Go away, for Allah has forgiven you." And about the man who had intercourse with her, the Prophet said: "Stone him to death."¹¹

According to al-Tarmidzi, the ḥadīth is *gharib* (strange) in the chain of transmission which does not merit authenticity, but the meaning is acceptable and practised by the companions where the rape victim is exempted from punishment.¹² As such, one can conclude that this ḥadīth implies proving rape to be different from proving *zinā* because the Prophet accepted the solitary evidence of the raped woman, in the absence of the testimony of four eyewitnesses. This is sufficient to convict someone with rape as it is clearly mentioned in the above ḥadīth. This ḥadīth also leaves absolutely no doubt on the validity of the evidence of women in rape cases although it is not accepted for the *ḥadd* of adultery where there should be four just men.

The traditional jurists also accept circumstantial evidence to prove that a victim has been raped. Mālik, for example, mentions that a claim of rape cannot be accepted unless it is associated with evidence such as bleeding or screaming or other reasonably accepted evidence to show that she was usurped unwillingly.¹³

Ibn Ḥazm observed that any circumstantial evidence of rape could be admitted although it is from another person who did not watch the scene. He narrates a rape case at the time of 'Umar 'Abd al-'Azīz. There was a muezzin who heard the victim cry for help who came to

¹¹ See Muḥammad 'Abd al-Rahman ibn 'Abd al-Rahim al-Mubarakfuri *Tuhfat al-Ahwazi bi sharh jami' al Tarmidzi*, Beirut: Dār al-Kutub al-Ilmiyyah 1990, vol. 5, 13. See also Muḥammad Nasir al-Dīn Al-Albani, *Irwa al-Ghalil fī, Takhrij Ahadith Manar al-Sabil*, Beirut: Maktab Islami, 1985, ḥadīth No. 2588, according to him the ḥadīth is weak (*dha'if*).

¹² See al-Mubarakfuri, *Tuhfat al-Ahwazi*, *ibid.*, vol. 5, 200.

¹³ Abū al-Walīd al-Baji, Sulaimān Ibn Khalaf, *al-Muntaqā Sharḥ Muwaṭṭa'*, Cairo: Dār al-Fikr al-Arabi, n.d., vol. 7, 146.

bear witness. The victim was released. This case was tried before Caliph ‘Umar ibn ‘Abd al-‘Azīz.¹⁴

These events again support the view that evidence for rape is accepted even from one person. Thus, the evidence can be divided into two. Firstly, the evidence for the victim, which does not require four eyewitnesses. Any reliable proof which shows that there is any element of assault or force is regarded as rape, and this will save her from the charge of *zinā* or *qadhf* while making a claim. Secondly, the evidence against the cruel rapist. The stringent requirement for this evidence can be deemed as a reason to avoid the severe *ḥadd* penalty. As such, the burden of proof is crucial to determine a suitable *ta‘zīr* penalty.

DISAGREEMENT OVER APPLYING THE PRINCIPLE OF AL-QIYĀS (ANALOGY) IN PENALTIES (AL-QIYĀS FĪ AL-‘UQŪBĀT)

The root of the jurists’ dispute in adopting an appropriate approach to proving rape stems from their disagreement on the basic principle of whether or not to apply analogy in the case of penalties for crimes. Those who classify rape as similar to *zinā* rely on the mechanism of *qiyās*.

Qiyās or analogical reasoning is one of the primary sources of Islamic law after the Qur’ān, Sunnah and *ijmā‘*. Although it is almost unanimously agreed between Muslim jurists to use *qiyās* extensively in many legal issues when there is no direct textual evidence, they hold different opinions with regard to the applicability of the doctrine of *qiyās* in the issues of crimes and penalties.

The majority of the jurists do not make any distinction in this respect, and maintain the view that *qiyās* is applicable to these circumstances in the same way as it is to other rules of the *Sharī‘ah*. They support their view by generalizing the indicators of the Qur’anic passages and *ḥadīths* which are quoted in favour of the admissibility of *qiyās*, which are all worded in absolute terms, without drawing any distinction in regard to penalties. Since the evidence in the sources does

¹⁴ Ibn Ḥazm, Ali ibn Ahmad, *al-Muḥalla bi al-athar*, Beirut: al-Maktab al-Tijari, no date, 259.

not impose any restriction on *qiyās*, it is therefore applicable in all spheres of the Shari‘ah.¹⁵ An example of *qiyās* with regard to penalties is the application of the same punishment for sodomy as for *zinā*. Majority of the jurists draw an analogy between *zinā* and sodomy and apply the *ḥadd* of the former to the latter by analogy.¹⁶

The Ḥanafis, however are against this view. The Ḥanafis are in agreement with the majority to the extent that *qiyās* may validly operate in *ta‘zīr* penalties, but they oppose the application of *qiyās* in penalties and *kaffarat* (acts of atonement). They do not apply analogy between *zinā* and other sexual offences, and these offences should, according to them, be penalized under *ta‘zīr*.

The reason for their argument is that the ‘illah (occasioning factor) of the *qiyās* founded in *ḥadd* cases involves a measure of speculation and doubt. And the *ḥadd* doctrine eliminates the implementation of the punishment when there is any sort of doubt in conviction. This is based on the ḥadīth: “Drop dubious *ḥadd* cases as far as possible. If there is a way out, then clear the way, for in penalties, if the imam makes an error on the side of leniency, it is better than making an error on the side of severity.”¹⁷ The Ḥanafī scholar, Ibn Ḥazm al-Ẓāhirī, who does not accept the validity of *qiyās*, holds the same view.¹⁸

Adopting the same mechanism of proving rape as for *zinā*, based on *qiyās*, is refutable. This is because of the fact that rape entails the right of Allah (illegal sexual intercourse) and the right of another fellow human being (i.e. usurpation). There is no victimization in *zinā* contrary to rape since *zinā* takes place by mutual consent. For the prosecution of rape, one has to prove that the rapist has actually committed the crime and at the same time that the victim is innocent. This is because conviction of the crime will result in severe physical punishment as well as financial compensation.

In other words, besides its investigation to convict the criminal, the court also has a duty to investigate the impact suffered by the victim

¹⁵ Abū Zahrah, *Uṣūl al-Fiqh*, Cairo: Dār al-Fikr al-‘Arabi, 1958, 205.

¹⁶ Al-Shawkānī, *Irshād al-Fuḥūl*, ed. Abu Mus’ab Muḥammad, Beirut: Mu’assasat al-kutub al-thaqafiyya, 1998, 222.

¹⁷ Ibn Qayyim, *I‘lam al-Muwaqqi‘in*, Beirut: Dār al-Jail, 1973, vol. 1, 209.

¹⁸ Ibn Ḥazm says: “Whoever considers sex with an animal and sodomy as similar to *zinā* is ignorant of the concept of *zinā*.” See Ibn Ḥazm, *al-Muḥalla*, vol. 12, 401.

such as physical injury, trauma and other medical consequences. There is a special provision in Islamic law called the law of *jirāḥ* (wounds). It is not only the issue of penetration, but the victim has the right to be compensated for every single harm to any part of her body, particularly her private parts. All these harms need to be proven and valued. The criminal is liable to pay all the financial compensation demanded by the victim once it has been scrupulously ascertained by the experts.

Based on these arguments, there is a need to differentiate between prosecuting *zinā* and rape. Rape deserves a different approach of proving, for both the victim and the criminal respectively. Proof of victimization is acceptable however slim it is, such as a scream for help, because it aims at avoiding punishment. In contrast, it is made difficult to prove the guilt of a criminal, because it will make him liable to severe punishment.

ADMISSIBLE EVIDENCE OF RAPE

Bayyinah (evidence) has been used to connote “strong proof” because it makes the truth evident and obvious. Hence it refers to anything that manifests the truth.¹⁹ It is not limited to the testimony of witnesses but connotes a wider meaning of proof. The ḥadīth “the burden of proof is on the plaintiff” supports the argument that *bayyinah* refers to anything which clarifies the plaintiff’s claim so that a verdict can be made accordingly.²⁰

The testimony (*shahādah*) of witnesses is the most important kind of *bayyinah* (evidence) so much so that the term *bayyinah* is sometimes used as a synonym for ‘witnesses.’²¹ This assertion can be found in most of the classical works on Islamic jurisprudence by the

¹⁹ “*Al-Bayyinah Ismun likulli ma yubayyinu al-Ḥak.*” See Ibn Qayyim, *al-Ṭuruq al-ḥukmiyyah fī al-siyasah al-syar’iyyah*, ed. Zakariya Amirat, Beirut, Dar al-Kutub al-Ilmiyyah, 1995, 19, *I’lām al-Muwaqqi’īn*, vol. 1, 71. Ibn Farḥūn, *Tabṣirat al-Ḥukkām fī usul al-aqdiyah wa al-ahkam*, Beirut: Maktabat al-ma‘arif, no date, vol. 1, 172.

²⁰ Ibn Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, 10.

²¹ Joseph Schaht, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964, 192.

earlier jurists in the Shāfi‘ī,²² Ḥanafī,²³ and Ḥanbalī schools of law.²⁴ Such testimony as the basis of proof has been widely used in the Qur’ān in many cases including transactions between people, divorce, bequest and criminal offences.

The medieval jurists such as Ibn Taimiyyah,²⁵ Ibn Qayyim,²⁶ Ibn Farḥūn²⁷ and Abū Ḥasan al-Tarabulṣī²⁸ expand the scope of *bayyinah* extensively which encompasses every general form of proof. According to them, the word ‘*bayyinah*’ as it is used in the Qur’ān and the *Sunnah* and among the companions refers to everything by which the truth becomes evident.

Ibn Qayyim says:

“There is no doubt that besides the testimony of a witness (*shahādah*), sometimes other types of proof might be stronger than *shahidah*. The law giver does not abandon *al-qarā’in* (relevant facts), *al-amārāt* (surrounding facts) and *dalālāt al-aḥwāl* (circumstantial facts) as a proof. Those who have a careful study of the sources of Sharī‘ah will take this matter into account.”²⁹

Based on this assertion, one can suggest that circumstantial and corroborative evidence which is known (*qarā’in*) in Islamic criminal law and procedure should also be used to prove rape. The majority of the Muslim jurists are in favour of the admissibility of *qarīnah* for testimonial law.³⁰ This view could be generalized for all sorts of lawsuits,

²² Al-Khaṭīb al-Sharbīnī, *Mughnī al-Muḥtāj*, Beirut: Dār al-Fikr, n.d. vol. 4, 461.

²³ Al-Sarakhsī, *Kitāb al-Mabsūṭ*, vol. 16, 112.

²⁴ Ibn Qudāmah, *al-Mughnī*, vol. 11, 403.

²⁵ Aḥmad ibn Abd al-Ḥalīm Sheikh al-Islam Ibn Taimiyyah, *Majmū‘ al-Fatāwā*, ed. Abd al-Rahman ibn Muḥammad ibn Qasim al-Najdi, Riyadh: Dār ‘Alam al-Kutub, 1991, vol. 35, 394-395.

²⁶ Ibn Qayyim, *al-Turuq al-Hukmiyyah*, 19.

²⁷ Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol. 1, 172.

²⁸ Al-Tarabulṣī, ‘Alā’ al-Dīn Ibn Khalīl, *Mu‘īn al-Ḥukkām*, Egypt: Matbaah Mustafa al-Babī, 3rd edn., 1973, 68.

²⁹ Ibn Qayyim, *I‘lām al-Muwaqqi‘īn*, vol. 1, 71.

³⁰ Ibn ‘Abidīn, *Ḥāshiah*, vol. 5, 354. Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol. 2, 93.

whether civil or criminal. *Qarīnah* is therefore, not only circumstantial evidence which functions as supporting evidence but could also be fundamental evidence which yields a certainty.

They disagree, however, with regard to the use of *qarīnah* in the case of a *ḥadd* offence. Most jurists, among them the Ḥanafites, Ḥanbalites and Shāfi'ites, hold the view that *qarīnah* is not acceptable to prove a *ḥadd* offence.³¹ Those who support *qarīnah* evidence for *ḥadd* cases are the Malikites and some Ḥanbalites like Ibn Taimiyyah and Ibn Qayyim.³²

Rape, as stated earlier, is a special case which deserves a special approach of prosecution, proof and punishment. Therefore, *qarīnah* is essential and fundamentally acceptable evidence.

There was a consensus among the Prophet's companions and the rightly guided caliphs about using *qarīnah* prior to issuance of a verdict. An incident happened where a woman came to Caliph 'Umar complaining that she had been raped. She happened to fall in love with a youth from the Anṣār, but he paid no attention to her. She was angry with him. She took egg white and rubbed it on her clothes and between her thighs. Then, she came to 'Umar crying that the man forced her to have sex and degraded the honour of her family, showing the marks on her clothes and body. 'Umar consulted the ladies of Madinah and they said that they found semen on her cloth and body. He wished to punish the accused who then appealed: "O Amīr al-Mu'minīn, please reinvestigate my case. In the name of Allah I never committed the crime nor did I love her. She molested me but I refused." 'Umar again consulted 'Alī. 'Alī asked permission to examine the proof. He took very hot water and poured it on the woman's cloth and it boiled the egg. He took the cooked egg, smelled it and tasted it. He concluded that it was only egg white and not semen. He interrogated the woman and she confessed that it was her trick.³³

³¹ Ibn Qudāmah, *al-Mughnī*, vol. 10, 192. al-Shaukānī, *Nail al-Auṭār*, Beirut: Dār al-Jail, 1973, vol. 7, 160, al-Kāsānī, *Badā'ī' al-Sanā'ī'*, vol. 7, 46. al-Sharbīnī, *Mughnī al-Muḥtāj*, vol. 4, 149.

³² Ibn Qayyim, *I'lām al-Muwaqqi'īn*, vol. 1, 87. Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, vol. 2, 11.

³³ Ibn Qayyim, *al-Ṭuruk al-Ḥukmiyyah*, 49.

The lesson from this incident is that ‘Alī used a scientific method before arriving at the conclusion that the fluid was egg white. This was accepted by ‘Umar and the rest of the Companions. There was no objection from the rest of the Companions regarding the reliability of ‘Alī’s method in proving the guilt of the woman.

SHOULD A COMPLAINANT OF RAPE BE CHARGED WITH COMMITTING *QADHF* WHEN THERE IS NO SUFFICIENT EVIDENCE?

Qadhf means falsely accusing another person of committing *zinā*. *Qadhf* is one of the fixed *ḥadd* crimes aimed at safeguarding human dignity and virtue. In modern society, as in earlier times, the accusation of rape is sometimes used as a weapon to attack a person’s reputation and position, for personal reasons or publicity. The cause for that evil has been avoided in advance in Islamic law. The person who makes such accusation has to produce the required evidence. Otherwise, his accusation will be considered malicious, and is punishable by eighty lashes.³⁴ The Qur’ān clearly states:

“And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever. They indeed are corrupt” (al-Qur’ān, 24:4).³⁵

This Qur’ānic verse prescribes a punishment for making false accusations against chaste women, i.e. those who are free, adult and chaste. However, Muslim jurists unanimously generalize the prohibition of slander to include men as well. Failure to provide concrete evidence

³⁴ Muḥammad ‘Aṭa’ Sidaḥmad, *The Hudud*, Kuala Lumpur, 1995, 70. Ibn Ḥazm narrates views of Zuhri and Qatadah regarding a woman’s complaint that a man raped her when she had no evidence (*bayyinah*). According to them, she must be punished for *qadhf*. This means that a complaint without supporting evidence is not encouraged as she is responsible for what she claims. See Ibn Ḥazm, *al-Muḥallā*, 259.

³⁵ Aishah was accused of committing such a crime. The verse 24:4 was specially revealed to clear her from the allegation.

makes the incriminator a criminal, liable to the punishment for slander of eighty lashes. The person pressing false charges is also labelled as a liar besides facing the threat of being discredited as a competent witness in the future.

There is an *athar* mentioning the occasion where Caliph ‘Umar punished witnesses who were giving testimony that they saw al-Mughīrah Ibn Shu‘bah, the governor of Basra, committing *zinā*. Their testimony was rejected because of a slight incoherence in the testimonial facts. Three witnesses gave the same consistent description of how the crime took place, while the fourth witness gave a slightly conflicting detail in his testimony.³⁶ It is understood that even if four witnesses saw a couple having sex, but with some slight inconsistency, this testimony would not only fail to support a *zinā* charge, but these witnesses would also be liable for slander.³⁷

The rationale of this injunction is to deter scandalous accusations that interfere in the private matters of families. This is backed by the severity of the sentence for uncertain or mistaken allegations. The subsequent application of this law, however, has veered away from this consideration and has actually compounded the former issue.

The crux of the argument is whether a rape victim who complains about aggression against her will be charged for committing the *ḥadd* crime of *qadhif* (i.e. the offence of accusing the culprit of *zinā*), which means she would end up with the penalty of eighty lashes on her back because of her failure to bring four witnesses.

³⁶ Al-Ṭabarī, *Jāmi‘ al-Bayān, Jāmi‘ al-bayān an ta’wil al-Qur’ān*, Beirut: Dār al-Shamiyya, 1997, vol. 9, 267, Ibn al-‘Arabī, *Aḥkām al-Qur’ān*, ed. Muḥammad ‘Abd al-Qādir, ‘Ata’, Beirut: Dār al-Kutub al-‘ilmiyya, 1997, vol. 3, 348, al-Qurṭubī, *al-Jāmi‘ li al-Aḥkām al-Qur’ān*, Cairo: Dār al-Sha‘b, n.d., vol. 12, 110. The witnesses were Abū Bakrah, Shibl and Nāfi‘ and Ziyād. Ziyad was not so sure about the identity of the accused woman al-Mughīrah, who allegedly committed *zinā* in addition to the fact that he did not watch with his naked eyes how the penetration took place.

³⁷ This high standard of proof in Islamic procedure is intended to avoid error and to prevent abuse of judicial discretion as well as to maintain respect for the court. See Lippman, Matthew Ross, et al. *Islamic Criminal Law and Procedure: An Introduction*, New York, London: Praeger, 1988, 121.

There is first a need to understand the nature of *qadhf* itself as a particular crime which has a link with *zinā*. *Qadhf* is highly condemned because it degrades the honour and dignity of others. It must be acknowledged that the Qur'ānic verse pertaining to *qadhf* is to defend chaste women from unjustified accusations. Women will suffer more than men in terms of family reputation, added with the possibility of pregnancy and bearing children.

It is interesting to note that, based on the ḥadīth of 'Abd al-Jabbār Ibn Wā'il which reported a rape case that occurred at the time of the Prophet, the female victim's statement is not considered as *qadhf*. She was never asked to produce four eyewitnesses. It is considered as a complaint-cum-accusation of rape, not *zinā*. The above ḥadīth establishes a principle: upon a woman reporting that she was forced to commit adultery, she was not punished because of her failure to produce four eyewitnesses. It is also worth to note that her statement was not considered as a confession of *zinā*. The perpetrator was convicted by other means of proof. A similar ruling is reported from Caliph 'Umar Ibn al-Khaṭṭāb.³⁸

Al-Māwardī mentions five conditions that need to be met by the slandered individual, namely: legal majority, soundness of mind, Islam, freedom and virtue (*al-iffah*). If he is a minor, slave, an unbeliever, or vulnerable on account of past prosecution of adultery, the slanderer is not subjected to the statutory penalty, but merely castigated for malice and obscenity of language.³⁹

This shows that the accused person must be a clean decent person who has never engaged in any illegal relationship. The slander is purposely aimed at him to embarrass him. This means that, if there is other supporting evidence that she was raped and that there was an element of forcible sexual assault, the prosecution of rape must continue and the issue of slander must be ignored.

Ibn Ḥazm, in clarifying the issue, makes a very remarkable observation. According to him, a complainant is either committing *qadhf* and should be punished with the *qadhf* penalty upon conviction, or lodging

³⁸ Ibn Qudāmah, *al-Maqdisī*, *al-Mughnī*, vol. 8, 129.

³⁹ Al-Māwardī, *al-Aḥkām al-Sulṭāniyyah*, (The Ordinances of Government), trans., Wafaa H. Wahba, Reading, UK: Centre for Muslim Contribution to Civilization, Garnet Publishing limited, 1996, 251.

a complaint for her rights seriously. The victim's complaint should not be treated similar to *qadhf* since *qadhf* aims at embarrassing and degrading one's reputation. In this situation she is not making an accusation. Instead, she is complaining and prosecuting. There is however a need for her to produce evidence (*bayyinah*). If she manages to produce evidence, the perpetrator must be punished with the penalty of *zinā*. If there is no evidence, he is released. With the absence of evidence, she must not be charged with *qadhf* because rape itself entails the right of Allah and the right of a human being (the victim's right). The right of Allah is the crime of *zinā* itself which requires the mandatory penalty but could not be proved. Meanwhile, the victim's right involves usurpation and aggression against her honour. In respect of her right, the accused has to swear in the name of God that he never acted aggressively against her and never usurped her, and declare that he is innocent of the accusation against him. This is similar to other disputes involving the right of another fellow human being. The accused should not swear that he did not commit *zinā* because such is the right of God and therefore will be reserved between him and God.⁴⁰

Ibn Ḥazm adds:

“Giving testimony of *zinā* is not committing *qadhf*. If a witness is to be punished of *qadhf* for the lack of number of the eyewitnesses, the crime of *zinā* will never be convicted. Supposed that a person gives a testimony of *zinā* alone, then, he will be charged of *qadhf*. The following eyewitness also will be charged of *qadhf*. Then, there will never be a conviction of *zinā*. This is against the injunction of the Qur’ān to provide witnesses for *zinā*. It is also against the teaching of the *sunnah* to accept *bayyinah* of *zinā*. This is also against *ijmā’* to accept the eyewitness testimony to prove *zinā*. Moreover it is against a logical argument as well as a sound sense that neither a witness is an accuser nor an accuser is a witness.”⁴¹

With regards to the incident of Abū Bakrah making accusation against al-Mughīrah, this particular case should not be generalized for

⁴⁰ Ibn Ḥazm, *al-Muḥalla bi al-Athār*, vol. 12, 261.

⁴¹ Ibn Ḥazm, *al-Muḥalla*, vol. 12, 212-213.

the prosecution of rape. This is because the accusation made against al-Mughīrah was one of committing *zinā*. A complaint of being raped is different since it does not involve a third party, but is between the criminal and his victim.

The *ḥadd* of *qadhif* is important in protecting a person's honor. A rape victim who makes a complaint should not be charged with *qadhif* if the claim is accompanied with reliable evidence that the forcible rape has taken place. As far as the right of God (the prohibition of *zinā*), and the right of a human being (violence against a person's honour) are concerned, the victim has the right to make a report of rape and proceed with prosecution. On the other hand, in the absence of evidence, it is the right of the accused to plead not guilty and deny the accusation by taking an oath. It is worth noting that a survivor of a sexual assault may report the case to the police department or the authoritative body for further legal action.⁴² It is not the prerogative of the victim to prosecute the culprit for rape. Initial investigations will determine whether it is possible to proceed with the prosecution.

CONCLUSION

In Islamic criminal law, evidence of an eyewitness's testimony is the most admissible and acceptable form of evidence. However, it is not the only method of providing proof. It is a much more acceptable and realistic view to include some modern approaches to prove crimes. Besides the prescribed methods of proving certain crimes, there is no restriction at all in the Qur'ān or the *Sunnah* against adopting any other universally acceptable methods of proof. In other words, besides the testimony of witnesses, the confession of criminals and oaths, various other methods of *qarīnah* (circumstantial evidence), such as medical check-ups, post mortem reports and finger-prints are perfectly acceptable. In proving rape for example, it requires *qarīnah* that penetration has taken place and that there was forcible assault and resistance from the victim.

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It is the official body referred to as '*Hisba*' which is established by the Muslim authority. Among its goals is to give protection for the victims.

The misconception and confusion connecting rape and adultery should not exist as they differ as regards proof and conviction. Other than the testimony of eyewitnesses, other fresh evidence such as cuts, semen, saliva, blood, hair, fibers, skin scrapes, bite marks, and other scientific evidence are acceptable to prove penetration, forcible assault and resistance of the victim as well as to identify and convict the rapist with the highest accuracy. These proofs are admissible and it is unnecessary for a rape victim to present four witnesses to prove the crime. In addition, the assumption that failure of providing sufficient evidence of rape is an admission of *zinā* is against those principles of evidence and against common sense, because a confession is an admission of guilt while an allegation of rape is a repudiation of guilt.