

**AN ANALYSIS OF *PRIMA FACIE* EVIDENCE BASED ON *QARINAH* CONVICTION
IN MATRIMONIAL OFFENSES IN THE SELANGOR SYARIAH COURT**

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Abstract	<p><i>A claim before the Syariah court aims to either attest one's right or interest over a particular matter or defend such interest against the claiming party. At this juncture, the onus of proof lies with the party initiating the claim. In the context of Syariah Criminal Law, a Syarie Prosecutor has the discretionary power to bring a criminal claim against the accused in cases pertaining to Syariah offences, be it criminal or matrimonial, should there exist a strong qarinah that successfully establishes a prima facie case. However, there has been a lack of guidelines in proving prima facie in cases relating to matrimonial offences. Therefore, this study examines the methods of establishing prima facie based on qarinah in matrimonial cases, particularly, in cases decided by the Syariah Courts of Selangor. For data collection, the researchers employ qualitative methods through analysis of legal documents, case files from the Syariah Court, and its ratio decidendis. The findings of this study show that matrimonial offences are considered criminal offences under the Islamic Family Law (State of Selangor) Enactment 2003. Hence, a case is considered a strong establishment of qarinah, sufficient to indicate prima facie for matrimonial offences, enabling the Syarie Prosecutor to prosecute the accused. Despite that, the qarinah itself must reach the degree of confidence, or al-zan al-ghalib, and not at the level of assumption, doubt, and waham. The authors believe this study may open doors to further discussions on Islamic Family Law, specifically in proving a prima facie case for matrimonial offences.</i></p> <p>Keywords: <i>Matrimonial, Offences, Prima Facie, Qarinah, Selangor.</i></p>
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INTRODUCTION

Islamic Family Law (State of Selangor) Enactment 2003 (IFLSE 2003) enunciated several legal provisions pertaining to the matrimonial offenses as well as its penalties, entailing offenses relating to marriage solemnization and registration (Sections 35-40), polygamy without the Syariah court's permission (Section 124), divorce outside and without the Syariah court's permission (Section 125), persecuting wife or husband (Section 128) and others. All of these matrimonial offenses are considered *mal offenses* that may be penalized with either fines or imprisonment, or even both concomitantly. One who commits any of these matrimonial offenses as provided in the Enactment will be prosecuted and convicted before the Syariah court if the offender has been proven *prima facie* guilty. The onus of proving a *prima facie* case lies upon the Syarie Prosecutor in order to enable him continuing the whole trial.

RESEARCH METHODOLOGY

This qualitative research uses the method of analysing documents by appraising multiple sources which includes the Islamic Family Law (State of Selangor) Enactment 2003 as well as several Arabic manuscripts, books and dictionary. Another main source that being relied upon in order to ensure the success of this research is assessments done towards the Syariah courts' judgments in several cases filed before it. All of these sources will then be analysed so as to obtain precise information regarding the method of prosecution and evidentiary process used by the Syarie Prosecutor, particularly, to measure the level of burden of proof for *prima facie* cases in matrimonial offenses that uses *qarinah* convictions. The outcome of this research will give impact towards academic contribution and become as a source of reference to legal practitioners as well as society in understanding how an offense may be proved even prior to the imposal of a charge made by the Syariah courts.

THE BURDEN OF PROOF OF THE PROSECUTOR

Burden of proof is a legal burden that ought to be discharged by the Prosecutor before any convictions against the accused may be ruled out. It requires a number of evidence to be brought before the Court or the extent of which onus of proving a case in Islam is needed to charge someone as guilty. This onus lies on the prosecuting party (Subhi Mahmasaniyy, 1952; 'Abd. Karim Zaydan, 2002).

The prosecuting party needs to attest his claims in order to sought rights or defend the aggrieved party in a dispute ('Ali Qura'ah, 1952). In all cases, be it *hudud*, *qiyas*, *diat*, *takzir*, whether it is concerning Allah's rights or human's rights or even a mixture of both.

There are four conditions of prosecution which are (1) *mudda'i* (the party who files a lawsuit againts the other with regard to certain rights or interests), (2) *mudda' alaihi* (the party who a claim of interests was made against him), (3) *mudda'* (the subject matter of the claim), (4) claim (it may be presented in the form of words, writing or signs that contains the claim made by the claimant against the other)

Since the conditions are conjunctive in nature, thus, only a claim that fulfils all of the conditions is considered a valid prosecution. It is mandatory for the responding party to answer the valid prosecution. The prosecuting party must lay out statements and evidence to support his claim. Generally, when the prosecuting party fails prove his claim, the alleged party will be required to avow. However, if he refuses, the vow will be returned to the prosecution.

On the other hand, for claims that does not satisfy any of the aforementioned conditions, the claim will be considered invalid, and as a consequence, the alleged party is not obliged to answer the claim made against him. Additionally, the presiding judge is also not allowed to accept the prosecution, in accordance with the Syariah Court Evidence (State of Selangor) Enactment 2003 (SCESE 2003) that elucidates the burden of proving allegations in *mal* cases is placed upon those who claimed and emphasized a statement to be true (*al-mudda'i*) and those who sworn to either deny or refute a fact (*al-muda'a alaihi*) (Section 72, SCESE 2003).

Pursuant to this, any party who wishes the court to give judgments with regard to any legal rights or liabilities that depends on the fact which he emphasized, needs to demonstrate the existence of the fact itself. When someone is subjected to prove the truthfulness of a fact, it may be implicated that the burden of proof is discharge upon that person (Section 73 (1) (2), 75, SCESE 2003).

CATEGORIES OF QARINAH CONVICTION

Qarinah refers to a question of fact, supplementary facts or sometimes called as circumstantial evidence. *Qarinah* originated from the word '*qarina*' which means to be with, to comes along, or to become friends. It also describes a thing that indicates something (Zaleha Kamaruddin & Raihanah Abdullah, 2002; Al-Bahnasiyy, 1962). Before the Syarie Prosecutor can prosecute the accused before a Syariah court, he must obtain a

strong evidence by analysing the existing *qarinah* found on the accused. Hence, when a case is convicted by the judge, it signifies that the burden of proof that brought the *qarinah* has reached the level of *yaqin* (certain). Meanwhile for the uncertain level, it can be divided to three categories which are *zan*, *syak* and *waham*.

Zan (ظن)

Zan means assumptions that are uncertain but weigh more towards truth. This level is still considered insufficient to convict a case. *Zan* is the opposite of *yaqin* (Mahmasaniyy, 1952). In the Quran, surat Yunus: 36, Allah said, in its English translation: "And surely assumptions can in no way replace the truth."

The verse explains that *zan* could not determine the truth. Moreover when it is already clear to be inaccurate and wrong to be begin with (al-Tabari, 1995M/1415H). Despite that, in certain circumstances, *zan* is able to assist in reaching the truth albeit it cannot assure certainty. This can be understood from the Quran, Surat al-Hujurat: 12, in which Allah said, in its English translation: "O believers! Avoid many suspicions, for indeed, some suspicions are sinful."

At times, *zan* matches the truth as was stated in the above verse of Surat al-Hujurat. *Zan* that reaches the level of *al-zan al-ghalib* (the heavy assumption) can be accepted as a statement of facts and evidence, thus, filling the gap of filling the gap of *yakin* when existing proofs fails to reach the *yakin* level. Say for an instance, if a ship drown in the high seas, it may be deduced that its passengers have died by virtue of a heavy assumption or *al-zan al-ghalib* (Mahmasaniyy, 1952).

Syak (شك)

Syak is a presumption that is uncertain whether it leans towards conviction or not. The equation between right and wrong could not be ascertained due to the equal probabilities of both. *Syak* is insufficient to elevate or erase *yakin*. There is a fiqh method emphasizing that *yakin* could not be elevated by *syak* (اليقين لا يزال بالشك). This means that *yakin* could not be defeated or set aside by or set aside by *syak* considering the fact that *yakin* is the highest level of conviction while *syak* is below and lower than the level of certain possibility. Due to that, the *syak* assumption cannot set aside or even defeat a certain fact that reaches the level of *yakin* (Mustafa Ahmad al-Zarqa', 1968).

Waham (وهم)

Waham is a supposition or uncertain circumstance which akin to mistake, opposing to *zan*. *Waham* is something that should not be taken into consideration cannot be made as a ground of conviction. This is because, it fall under the category of 'mere probability' without any basis or evidence. This type of probability is rejected (Mahmasaniyy, 1952).

In spite of that, not all probabilities are rejected and ought to not be taken into consideration. If it is backed up with reasons and *daleel*, it is no longer 'mere probability' but is now shifted to a status of fact that may be taken into account in judgments. Probabilities may further be divided into two types:

First, a mere probability that was not rooted or supported by evidence or testimonies. This falls under *waham*, and this probability must be rejected. Second, the probability is strengthened with testimony and evidence. This type of probability may be accepted in a court, and sometimes, it is even prioritized over other evidence and testimonies (Mahmasaniyy, 1952).

From the above explanation, it can be understood that the weight of evidence or burden of proof sometimes reaches the heavy level of assumption that is *yakin*. Nonetheless, *yakin* which was meant in *qarinah* by the Islamic jurists is not *yakin* without any absolute doubt. It only falls within the category of heavy assumption (*al-zan al-ghalib*), and not the absolute *yakin* (beyond doubt). The reason is due to the fact that no matter how strong testimonies are based on evidence, they will never escape the room of doubt. Thus, in seeking *qarinah* element in a case, the claim must attain the uncertain level of *al-*

zan al-ghalib, not solely relying on mere probabilities since *qarinah* will not be accepted blatantly by the court (al-Bahai, 1965).

AN ANALYSIS OF PRIMA FACIE PROOF BASED ON QARINAH CONVICTION IN MATRIMONIAL CASES HEARD BEFORE THE SELANGOR SYARIAH COURT

Prima facie denotes an instance in which a case may be further tried by the court due to the existence of strong evidence (Zaleha Kamaruddin & Raihanah Abdullah, 2002). It also refers to a strong manifestation of a case in the rough view of a layman before it is even investigated in detail (Kamus Dewan, 2019). The *prima facie* term is often used in criminal and civil cases, and this also includes Syariah criminal lawsuits. The term is also applicable in cases concerning matrimonial offenses as it sits under the umbrella of criminal *mal* cases that involve penalties as what had been provided in the IFLSE 2003, which consists of Sections 35-40 that elucidate penalties regarding marriage solemnization and registration and Sections 124-131 that stipulate penalties for other matrimonial offenses.

In order to convict a matrimonial offense under the IFLSE 2003, the Syarie Prosecutor must first prove the facts of the case claimed in the charge and other documents submitted to the court based on *qarinah haliah* (situation or atmosphere) (al-Bahai, 1965). As an illustration, if a divorce occurs without the consent and outside the court, a matrimonial offense under section 125 of the IFLSE 2003, the claimant needs to file a divorce verification by submitting relevant details such as personal information, time, date, and place of divorce. At the same time, the Syarie Prosecutor can utilize those details as the facts of the case to prosecute the alleged party who commits the divorce offense. Usually, the details given are already sufficient to prove a *prima facie* case as the existing details are no longer in the *zan*, *syak*, and *waham* levels, but already constituted a *yakin* burden of proof or have reached the level of *al-zan al-ghalib*. This is because the facts were submitted by the offender himself.

In a matrimonial case involving a solemnization offense, *Syarie Prosecutor v Nurfazian & Othman* (Case number: 10021-165-0238-2017), the *qarinah* in the facts of the case illuminated that the female accused had married her partner in Thailand on 26 November 2015. She was proved to have committed an offense as she failed to obtain marriage permission from any authorized Registrar of Marriage, Divorce, and Reconciliation before the marriage takes place. This action is in contrast with Section 19(a) IFLSE 2003 and the accused was found guilty under Section 40(2) of the same Enactment. Meanwhile the male accused was convicted under Section 134 of the IFLSE 2003 for abetment of the crime committed by the female accused as he became a witness for the marriage. The marriage verification was filed at the Shah Alam Syariah Lower Court on 12 April 2016. Based on the details registered by the accused as well as corroboration from the Syariah Court, a conviction of *qarinah* allows the Syarie Prosecutor to prosecute both of the accused for the offense of marrying without permission as it had been successfully proven that there was a *prima facie* case.

Additionally, for the offense of committing polygamy without the court's permission, there is a case of *Mohd. Daud v Syarie Prosecutor* (Case number: 10010-166-0001-2008), which was filed before the Kuala Selangor Syariah Lower Court, whereby the *qarinah* in the facts of the case adduced that the accused had married for the second time on 24 February 2003 in Thailand with a woman named Yusrina. At the material time, the accused still has a legal wife named Zuraidah. Based on the *qarinah* in the charge paper, he was prosecuted for committing an offense of polygamy without the court's permission under Section 123 of the IFLSE 1984. He was found guilty and convicted due to the existence of several documents submitted before the court entailing a verified copy of the marriage certificate registered under the name of the accused and his first wife and another verified copy of the marriage certificate verified by the Islamic Council of the Pattani District in Thailand between the accused and his second wife.

An akin situation may also be traced in the case of *Suhairi v Syarie Prosecutor* (Case number: 10010-166-0026-2012) filed before the Kuala Selangor Syariah Lower Court,

concerning an offense of polygamy without the court's permission. *The qarinah* that was read in the charge paper stipulated the fact that the accused had married a woman named Siti Amnah, making her the second wife of his on 14 January 2011. Based on the *qarinah*, the accused was prosecuted under section 23 of the IFLSE 2003 which is the offense of committing polygamy without the Syariah court's permission. In this case, the accused was found to be married to a woman named Ropeah on 27 Jun 1977 at Johor and had never divorced his first wife since then until now.

According to the *qarinah* in the facts of the case as well as shown in the submitted documents, the Syarie Prosecutor had successfully proven that the accused had committed polygamy without the Syariah court's permission. The burden of proving such a claim lies on the shoulder of the Syarie Prosecutor, by virtue of a fiqh ruling called: *البينة على الدعي واليمين على من انكر* (justification is on the claiming party and swore is upon whoever refutes) (Mahmud Saedon A. Othman, 2003).

It is a trite principle in criminal cases that an offense is depending on two circumstances. First, the action of the accused was contrary to the law or known as *actus reus*. Second, the accused must be in a sound state of mind while committing the offense and has the intention to do it which is called *mens rea*.

In one of the ratio decidendi in the cases of *Mohd Daud v Syarie Prosecutor* and *Suhairi v Syarie Prosecutor*, Justice Shukran Yusof found that the actions of both the accused to marry another woman for the second time were something that has been planned carefully, with the intention to commit the charged offense since the polygamy procedure in Thailand requires no permission from the court (*actus reus*). The accused also intended to commit the offense voluntarily, in the absence of force or threat from any parties, despite knowing such action was contrary to the law (*mens rea*). Plus, Mohd Daud, the accused, was someone who is knowledgeable and experienced with marriage procedure in accordance with the State Enactment considering the fact that he was a member of Parliament and generally understand the laws as he was involved in discussing any bill before it may be gazetted.

The accused indeed had the intention to commit polygamy using an easier and faster route without thinking about its further consequences. Albeit it is acknowledged that *syarak* permits any man who can afford to marry more than one as was explained in the Quran, surah al-Nisa: 3, however, the accused still need to make an application for polygamy under Section 23 of the IFLSE 2003 and demonstrate that he is qualified for that.

CONCLUSION

Penalties for matrimonial offenses enunciated in the provisions of the Islamic Family Law (State of Selangor) Enactment 2003 are criminal offenses that may be charged and prosecuted before the Syariah Court since it is a violation of the law. When a person commits a crime provided under the Enactment, he needs to file before the Syariah court the relevant documents as well as the details required such as personal information, the time at which the crime was committed, the date and place et cetera. The collected information is *qarinah* which will be assessed by the Prosecution to ascertain whether there is a *prima facie case* (strong evidence) before any action may be taken by the Syariah court. If it is found that there is a *prima facie case*, hence, the Syarie Prosecutor may prosecute the person based on the charge that relies on *qarinah* conviction, which is *qarinah haliah* (situation or circumstance). Pursuant to that, a case that relies on *qarinah* conviction must reach the level of *yakin* or *al-zan al-ghalib*, which is a burden of proof on the Syarie Prosecutor to establish a *prima facie case* of the offense committed by one before he may be charged and prosecuted before the Syariah court.

APPRECIATION

A token of appreciation to Universiti Teknologi MARA for funding the Research Grant MyRA for PhD Graduates (File Number RMC: 600- RMC/GPM LPHD 5/3(156/2021) and gratitude manifested to the Al-Qanatir: Internasional Journal of Islamic Studies for publishing this research paper.

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