

THE APPLICATION OF QARINAH IN CRIMINAL CASES: A
CASE STUDY IN PROSECUTION UNIT, JABATAN
AGAMA ISLAM WILAYAH PERSEKUTUAN
KUALA LUMPUR

NOR MASTURA BINTI MAT YUSOFF

KOLEJ UNIVERSITI ISLAM MALAYSIA

**THE APPLICATION OF QARINAH IN CRIMINAL CASES: A
CASE STUDY IN PROSECUTION UNIT, JABATAN AGAMA
ISLAM WILAYAH PERSEKUTUAN KUALA LUMPUR**

Nor Mastura Binti Mat Yusoff
(Matric No: 1030284)

Academic project report submitted in partial fulfillment for the degree of
BACHELOR OF SYARIAH AND JUDICIARY

**PERPUSTAKAAN
UNIVERSITI SAINS ISLAM MALAYSIA**

Faculty of Syariah and Law
KOLEJ UNIVERSITI ISLAM MALAYSIA
Nilai

Perpustakaan USIM



1000031910

May 2005


PERPUSTAKAAN UNIVERSITI SAINS ISLAM MALAYSIA	
GIFT / DONATION SUMBANGAN IKHLAS WITH BEST COMPLIMENTS	
FROM	FS4
DATE	12/10/07
ACC. NO	

AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the works in this academic project paper is my own except for my quotations and summaries which have been duly acknowledged.

Date: 15 May 2006

Signature : 
Name : Nor Mastura bt Mat Yusoff
Matric No : 1030284
Address : Kampung Jenerih Tujuh
To'Uban,
17050 Pasir Mas
Kelantan

ACKNOWLEDGMENTS

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allah, the Most Gracious and Most Merciful

Thanks and praise to Allah S.W.T because this project paper has been successfully completed. I am grateful to Allah for giving me the strength, patience and confidence to complete this academic project. Greeting to Allah S.W.T, and also to the Prophet S.A.W who has brought justice to their followers and the world peace and prosperity.

A thousand thanks to En Arif Fahmi Md Yusof as my advisor for his sacrifice of his time, giving knowledge, guidance and energy giving advices without complains and for giving me guidance until this project paper is completed. Hopefully, you and your family will always enjoy peace and prosperity in this world and the hereafter.

Also most gratefully to the Academic Division for giving an opportunity to the writer to do this academic project paper. Then, a high appreciation to the Faculty of Syariah and Law for the co-operation to complete this academic project.

A special appreciation also to, Prosecution Unit, Jabatan Agama Islam, Wilayah Persekutuan Kuala Lumpur, especially to En Mohd Yusof Bin Sulaiman, Pendakwa Syarie and all staff in giving information related to this academic project paper.

In addition, a special thank to my family who is so much helping me in completing this project paper. Without their co-operation, this project paper will not finish completely on time. May Allah S.W.T bless them and make their life become longer more meaningful and happier.

To my entire friend, indeed your co-operation since we met cannot be replaced with anything and you are always in my mind. A special acknowledgment to all who are involved in this project paper either directly or indirectly in order to finish this project paper. Thanks a lot to all of you.

Lastly, I want to say sorry for every wrong and scarcity of input in this project paper to whoever who are using this project paper as their reference for future studies or for other purpose. Hopefully, this project paper will be a guide in our daily life so Allah S.A.W will bless us all the way.

Wassalam.

ABSTRAK

Kajian ini membincangkan tentang penggunaan Qarinah di Unit Pendakwaan di Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur. Kajian ini bertujuan untuk mengkaji dengan lebih teliti, terperinci dan mendalam tentang Qarinah. Untuk memperolehi bahan dan maklumat, beberapa teknik kajian telah digunakan iaitu melalui buku, internet, dan temuramah pihak-pihak yang berkenaan di unit tersebut. Manakala teknik utama dalam usaha untuk memperolehi segala maklumat ialah di perpustakaan dan kajian di Unit Pendakwaan. Hasil kajian ini telah menunjukkan bahawa penggunaan Qarinah adalah amat penting dan ianya merupakan tunjang penguat dalam menyokong fakta sesuatu kes bagi memudahkan hakim membuat penilaian dan menjatuhkan hukuman. Hasil daripada kajian ini juga telah menunjukkan kepentingan penggunaan Qarinah didalam setiap kes, dan kekuatannya bagi mengukuhkan fakta serta hujah sewaktu perbicaraan di mahkamah.

ABSTRACT

This project paper discuss on the usage of *Qarinah* in Prosecution Unit in Jabatan Agama Islam Wilayah Persekutuan Kuala Lumpur. This aim of study is morally cautious, detailed and profound on the *Qarinah*. To obtain material and information, several techniques have been used which are from book, internet, and interview with the people in the above unit. While main technique in the effort to obtain all the information is in the library and study in the Prosetution Unit in Jabatan Agama Islam Wilayah Persekutuan Kuala Lumpur. This study shows that usage of *Qarianh* is very significant and it helps in supporting fact of certain case to facilitate decision making. This research also shows importance of the usage of *Qarinah* and its application as a proof in the court cases.

ملخص البحث

يتحدث هذا البحث عن القرينة واستخداماتها الدراسة الميدانية في قسم الدعوات في المجلس الإسلامي بالولاية الفدرالية كوالامفور. عرض البحث بالتفصيل عن مفهوم القرينة وتطبيقاتها في المحكمة الشرعية والحصول علي المعلومات قامت الباحثة بالدراسة المكتبة وذلك بمراجعة المصادر والمراجع ذات الصلة بموضوع البحث. مما قامت الباحثة بالدراسة الميدانية عبر المقابلات الشخصية مع المؤولين والجهات المعنية في قسم الدعوات في المجلس الإسلامي بهذا القضية. ومن خلال هذا البحث وجدت الباحثة أن القرينة مهمة جدا وتعدّها عمادا راسخا لتأييد الحجج والأدلة والبرهمن في حريان المحاكمة في المحكمة. وبانتخدم القرينة يتمكن الحاكم أو القاضي في إصدار أحكام وبناء علي ذلك فالقرينة مهمة جدا في المحكمة الشرعية.

TABLE OF CONTENTS

Contents	Pages
AUTHOR DECLARATION	i
ACKNOWLEDGMENTS	ii
ABSTRAK	iii
ABSTRACT	iv
<i>MULAKHKHAS AL-BAHTH</i>	v
TABLE OF CONTENTS	vi
LISTOF STATUTES	viii
GLOSSARY	ix
TRANSLITERATION	xi
ABBREVIATION	xv
CHAPTER ONE: INTRODUCTION TO RESEARCH PROPOSAL	
1.0 Background of research	xvi
1.2 Significance of study	xvii
1.3 Aim of research	xvii
1.4 Objective of research	xviii
1.5 Scope of research	xviii
1.6 Literature Review	xix
1.7 Research Methodology	xx
CHAPTER ONE: INTRODUCTION TO QARINAH	
1.1 Introduction	1
1.2 Literal and general meaning	9
1.3 <i>Qarinah</i> base on al-Qura'an and as-Sunnah	17
CHAPTER TWO: QARINAH BASE ON OPINION OF ISLAMIC SCHOLARS	
2.1 Opinion of the Islamic Scholars on <i>Qarinah</i>	24
2.2 <i>Qarinah</i> base on Mazhab Fiqh	26
2.3 The arguments of those who reject <i>Qarinah</i>	30
2.4 Types of <i>Qarinah</i> base on law	31
2.5 Types of <i>Qarinah</i> base on Islamic <i>fiqh</i>	37

**CHAPTER THREE: APPLICATION OF QARINAH IN PROSECUTION UNIT,
JABATAN AGAMA ISLAM WILAYAH PERSEKUTUAN KUALA LUMPUR**

3.1 The application of <i>Qarinah</i> in Prosecution Unit	40
3.2 Process in applying <i>Qarinah</i> in Prosecution Unit	42
3.3 How far the application of <i>Qarinah</i> will be used in Prosecution Unit	43
3.4 Attitude of the judges in application of <i>Qarinah</i> in criminal cases	44
3.5 <i>Qarinah</i> base on photo in criminal cases	45

CHAPTER FOUR: QARINAH IN CRIMINAL CASE

4.1 <i>Qarinah</i> in criminal cases	54
--------------------------------------	----

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1 Conclusion	69
5.2 Recommendation	71

BIBLIOGRAPHY	73
---------------------	-----------

LIST OF STATUTES

	Page
Statute 1: Laws of Malaysia Act 559 Syariah Criminal Offences (Federal Territories) Act 1997	54,55,59,61,65.

GLOSSARY

'ulama	: Plural of 'alim, Islamic jurists.
Al-zan al-ghalib	: Strong or heavy suspicion.
Amanah	: Trust.
Baligh	: Having attained the age of puberty according to Islamic Law
Bayyinah	: Evidence which proved a right or interest
Court	: The Syariah Subordinate Court, the Syariah High Court, or the Syariah Appeal Court, as the case may be, constituted under section 40 of the Administration Act.
Document	: Any matter expressed or described upon any substance by means of letters, figure or marks or by more than one of those means intended to be used or which may be used for the purpose of recording.
Fatwa	: Any fatwa made under section 34 of the Administration Act.
Fuqaha	: Islamic jurists.
Hadd	: A specific form of punishment laid down in the Qur'an
Hadith	: Saying of the prophet Muhammad S.A.W.

Hudud	: Several specific crimes and punishments laid down in the Qur'an.
Iqrar	: Admission.
Islamic Law	: Islamic Law according to any recognized mazhab.
Judge	: A judge of the Syariah Appeal Court, the Syariah High Court, and the Syariah Subordinate Court appointed under section 41, 42 and 43 respectively, of the Administration Act.
Majlis	: The Majlis Agama Islam Wilayah Persekutuan establish under subsection 4 (1) of the Administration Act.
Mufti	: The persons appointed to be the Mufti for the Federal Territories under section 32 of the Administration Act, and includes the Deputy Mufti.
Qadi	: A judge appointed by the ruler to settle disputes according to the shariah.
Qarinah	: A fact connected with the other in any of the ways referred to the hukum syarak.
Qazaf	: Making false allegation on any person.
Qiafah	: Evidence or to prove paternity.
Shahadah	: Evidence with the quality of truth given in a Court using the expression 'asshadu' in order to establish a right or interest of a person against another and if it is so established it bind the Judge.

TRANSLITERATION

ARABIC WORDS TRANSLITERATION SYSTEM TRANSLITERATION TABLE

1. ALPHABET

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ء	,	فأر	fa'r
ب	b	برد	burd
ت	t	تل	tall
ث	th	ثوب	thawb
ج	j	جدار	jidâr
ح	h	حليب	halib
خ	kh	خادم	Khâdim
د	d	ديك	dik
ذ	dhz	ذهب	dhzahab
ر	r	رفيق	rafîq
ز	z	زميل	zamil

س	s	سلام	salâm
ش	sh	شعب	sha [°] b
ص	s	صخر	sakhr
ض	d	ضيق	dayq
ط	t	طالب	tâlîb
ظ	z	ظالم	zalim
ع	°	عقل	°aql
غ	gh	غلام	ghulâm
ف	f	فيل	fil
ق	q	قلب	qalb
ك	k	كلام	kalâm
ل	l	لب	lubb
م	m	مال	mâl
ن	n	نجم	najm
ه	h	هول	hawl
و	w	ورق	waraq
ي	y	يم	yamm

2. Short Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ا	a	كتب	kataba
ي	i	علم	°alima
و	u	غلب	ghuliba

3. Long Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ى, ا	a	عالم, فتى	°âlim, fatâ
ي	i	عليم, داعي	°alîm, daî
و	u	علوم, أدعو	°ulûm, Ad°û

4. Diphthong

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
و	aw	نوم	nawm
ي	ay	ليل	layl

و	iyy	شافعي	Shâfi'îyy (ending)
ي	uww	علو	°uluww (ending)

ABREVIATIONS

Dr.	:doctor
ed	:editor
Hj.	:haji
n.a.	:no author/no artist
n.d.	:no date/no year
n.pb	:no publisher
p.	:page
pp.	:pages
RA	:radiya Allāh [°] anhu / [°] anha / [°] anhum
SAW	:salla Allāh [°] alayh wa sallam
SWT	:subhānahu wa ta [°] ala
trans	:translator/translated by
vol.	:volume
vers	:version

INTRODUCTION TO RESEARCH

1.1 BACKGROUND OF RESEARCH

Qarinah is very important in evidence whether exist only other evidence such as witnesses, *iqrar* in situation where does not have any evidence. According to *Qarinah*, court can reject a claim of the poor people, which admitted a wing to wealth. In certain cases, witness evidence or *iqrar* is rejecting because of speculation such as son become witness for their father. *Iqrar* also is defining as to those who are in unstable condition. *Qarinah* can be use when strong evidence exists from both sides. In the situation which that no other evidence, *Qarinah* can be accepted as the wholly evidence in making judgment, such as a wife who stay with her husband claim that her husband do not give livelihood. This accusation can be rejected according to *Maliki* and *Hambali* followers.¹

Qarinah is a thing which explain something, “together, accompany, or related”. *Qarinah* can be divided into two types. The first type is the *Qarinah Lafziyyah* or *Qarinah Ma'nawiyah*. The second type of *Qarinah* is base on circumstances and surroundings; this is known as the *Qarinah Haliyyah*.²

The writer chooses this topic because she wants to acquire the knowledge of how far the *Qarinah* can be admitted or will be rejected by the court.

¹ Sidi Ahmad Abdulah. 1998. **Pembuktian dan Keterangan dalam Undang-undang Islam Rujukan Khusus Kepada Qarinah**. Penerbit Universiti Malaya. P 17

² Mahmud Saedon A.othman. 2003. *An Introduction to Islamic Law of Evidence*. Kuala Lumpur. The Open Press. Pp. 117.

The writer chooses one of the parts in Prosecution Units of Jabatan Agama Islam Wilayah Persekutuan Kuala Lumpur because in this department they use *Qarinah* in proceeding in the court.

However, this topic has more significant and challenge to the writer because in order to finish this academic project the writer must make the interview with every people in different situation.

1.2 SIGNIFICANCE OF STUDY

This research is necessary and important because it can give information on how far the *Qarinah* will be use for such a proof or evidence in the court.

1.3 AIM OF RESEARCH

The final aim that the writer wants to achieve by doing the research is to get the knowledge and information about the *Qarinah* in Prosecution Units. The writer also makes this research us to inform the society about haw *Qarinah* will be used as a proof or evidence in the court.

1.4 OBJECTIVE OF RESEARCH

- i. To understand and study the definition and scope of *Qarinah*.
- ii. To understand and study about the way to apply *Qarinah* such as a proof or evidence in the court.
- iii. To know how far the application of *Qarinah* will be use in Prosecution Units.

1.5 SCOPE OF RESEARCH

- i. This scope for this research is to delve about *Qarinah* that will be used as a strong proof or evidence in the court.
- ii. To identify issue and problem that can be used *Qarinah* us a proof or evidence.
- iii. Lastly, to know about how the judge will have to admit or reject the *Qarinah* in the court.

1.6 LITERATURE REVIEW

According to *Dr. Mahmud Saedon A. Othman*, *An Introduction to Islamic Law of Evidence*, mentioned in details about the circumstantial evidence. It related to the writer academic project where the writer uses such one of the reference.

In a books author by *Dr. Abdul Karim Zaidan*, *Sistem Kehakiman Islam, Jilid 1*, mentioned the entire thing about the *Qarinah* in judgment system. It differs with the writer academic project in specific just in prosecution system.

According to *Dr. Mohd Osman Syabir*, *Masail fi Al- Fiqhu Al- Muqarin*, this book mentions *Qarinah* in judgment system and *ulama'* opinion in the same problem. The writer just uses this book us one of the reference in finish this research project that just specific about *Qarinah* in prosecution unit, not in judgment system.

In other book by, *Dr. Ahmad Fathi Bahansi*, *Al- Siasah Al- Janayah fi Al- Syariah Al- Islamiah*, it mentioned about law of *Qarinah*, it differ with the writer academic project because the writer choose to write about *Qarinah* in prosecution unit, but this book also can be use us one of the reference.

In addition, *Dr. Abdul Karim Zaidan*, *Prinsip-prinsip Pendakwaan Dan Pembuktian Dalam Sistem Kehakiman Islam*, state that about *Qarianh* base on *syarak* and *dalil* from al-Qur;an and as-Sunnah. The writer use this book us a references when the writer write about *dalil-dalil* that have a relation with *Qarinah*.

Beside these, *Haji Sa'id Haji Ibrahim, Qanun Jenayah Syar'iyah Dan Sistem Kehakiman Dalam Perundangan Islam Berdasarkan Qura'n Dan Hadith*, just mentioned about opinion of *Fuqaha* about *Qarinah* that *mu'tabarah* in *Zina* cases. This book mention about when a woman has a pregnant without a husband. It differs with the writer academic project paper, because the writer chooses to write about *Qarinah* such a proof in all cases not just in adultery cases.

1.7 RESEARCH METHOD

In order to complete this academic project, the writer used a few methods which are:

1) library research:

- i. Islamic University Collage of Malaysia.
- ii. National library
- iii. University Kebangsaan Malaysia (UKM Bangi)
- iv. Perpustakaan Awam Islam Jabatan Agama Islam Malaysia Pusat Islam

2) The writer will refer to:

- i. Books
- ii. Majalle
- iii. Enactment
- iv. Internet Information

3) Interview :

In this method the writer has interview the staffs in Prosecution Units Jabatan Agama Islam Wilayah Persekutuan Kuala Lumpur.

CHAPTER ONE

INTRODUCTION TO QARINAH

1.1 INTRODUCTION

Execute justice is demand Islamic. Justice in the judgment means to convict accurately as be decided by Allah S.W.T. base on explanation from the side involved.¹

سَمَّعُونَ لِلْكَذِبِ أَكَلُونَ لِلسُّحْتِ فَإِن جَاءُوكَ فَاحْكُم بَيْنَهُم أَوْ أَعْرِضْ
 عَنْهُمْ وَإِن تُعْرِضْ عَنْهُمْ فَلَن يَضُرُّوكَ شَيْئًا وَإِن حَكَمْتَ فَاحْكُم
 بَيْنَهُم بِالْقِسْطِ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ ﴿٤٢﴾

*Means: (They are fond of) listening to falsehood, of devouring anything forbidden. If they do come to thee, either judge between them, or decline to interfere. If thou decline, they cannot hurt thee in the least. If thou judge, judge in equity between them. For Allah loved those who judge in equity.*²

Justice unable to be up right except base on legal system, perfect implementation, proof and explanation accurate. Fair law get to be hoped its consequences when been to the managed perfectly. Connected hereby, side bear to the

¹ Sidi Ahmad Abdulah.1998.**Pembuktian dan Keterangan dalam Undang-undang Islam Rujukan Khusus Kepada Qarinah**. Penerbit Universiti Malaya. P 3

² Al- Qur'an Surah Al-Maidah: 42

answer manage and execute law have to consist of really people quality and understanding his function, and proof which will be given in the court.³

EVIDENCE IN THE JUDGMENT

In the judgment process, proof is very significant to ensure certain allegation can get justice fairly. Proof with less justice unable to be up righted although very good that law.⁴

وَلَوْ أَنَّهُمْ صَبَرُوا حَتَّى تَخْرُجَ إِلَيْهِمْ لَكَانَ خَيْرًا لَّهُمْ وَاللَّهُ غَفُورٌ
رَّحِيمٌ ﴿٥﴾

*Means: If only they had patience until thou couldst come out to them, it would be best for them: but Allah is Oft-Forgiving, Most Merciful.*⁵

This sentence explains the challenges which require explanation in the process of deciding certain punishment.⁶

Allah S.W.T. demands that every punishment must based on justice by following role which already given by Allah S.W.T besides prohibiting us from

³ Sidi Ahmad Abdulah.1998. P 3

⁴ Ibid. P.3.

⁵ Al- Qur'an Surah al-Hujrat: 5

⁶ Sidi Ahmad Abdulah.1998. P 5

punishing to follow carnal desire. Punishment based on justice means punishment based on explanation and proof which reach to the stage believe.⁷

PROOF IS DEMAND

Convict fairly is one duty against Allah S.W.T.

سَمَّعُونَ لِلْكَذِبِ أَكَلُونَ لِلسُّحْتِ فَإِن جَاءُوكَ فَاحْكُم بَيْنَهُم أَوْ أَعْرِضْ عَنْهُمْ وَإِن تُعْرِضْ عَنْهُمْ فَلَن يَضُرُّوكَ شَيْئًا وَإِن حَكَمْتَ فَاحْكُم بَيْنَهُم بِالْقِسْطِ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ ﴿٤٢﴾

*Means: (They are fond of) listening to falsehood, of devouring anything forbidden. If they do come to thee, either judge between them, or decline to interfere. If thou decline, they cannot hurt thee in the least. If thou judge, judge in equity between them. For Allah loved those who judge in equity.*⁸

Actual justice unable to be existed except from law which is fair, justice which is calibre and prestigious, explanation which is accurate and proof which is firm.⁹

⁷ Sidi Ahmad Abdulah.1998. P 5

⁸ Al- Qur'an Surah al-Maidah: 42

⁹ Sidi Ahmad Abdulah.1998. P 7

يَدَاوُدُ إِنَّا جَعَلْنَاكَ خَلِيفَةً فِي الْأَرْضِ فَاحْكُم بَيْنَ النَّاسِ بِالْحَقِّ
وَلَا تَتَّبِعِ الْهَوَىٰ فَيُضِلَّكَ عَن سَبِيلِ اللَّهِ إِنَّ الَّذِينَ يَضِلُّونَ عَن سَبِيلِ
اللَّهِ لَهُمْ عَذَابٌ شَدِيدٌ بِمَا نَسُوا يَوْمَ الْحِسَابِ ﴿٢٦﴾

Means: David! We did indeed make thee a vicegerent on earth: so judge thou between men in Truth (and justice): nor follow thou the lusts (of thy heart), for they will mislead thee from the Path of Allah: for those who wander astray from the Path of Allah, is a Penalty Grievous, for that they forget the Day of Acco.¹⁰

Even though this sentence be referred to Daud's prophet, his thought is also involve racial whole responsible Muslims in establish truth and justice in law. The big commendation unable to be carried out except manage the law fully wise base on fact which accurate and investigation which is tidy.¹¹

One justice convicts based on fact and explanation which will be given by the side who quarrel. Who can afford to bring proof with strong, result justice will side to him. Justice that gives result base on born and strength proof is not the true truth. The prophet S.A.W. emphasize to the two sides which just quarrel in front of him.¹²

Hadith from Ummu Salamah reported that the massager of Allah declared: "I'm only a human being and you bring your dispute to me perhaps some of you indulge in logic to prove your assertions and it may be that I give my decision or the

¹⁰ Al- Qur'an Surah Sad: 26

¹¹ Sidi Ahmad Abdulah.1998. P. 7

¹² Ibid. P. 7

strength of your argumentation. Should I therefore give one that which his brother entitled to he should not take it, for it would be as if I am giving my coal of fire''.¹³

*Hadith: "If anyone walks with an oppressor to strengthen him, knowing that the he is an oppressor he has gone forth from Allah."*¹⁴

Without obvious and accurate explanation certainly justice unable to be up right. People who appear to forward judiciary must give explanation and suggest fact necessarily assume himself become witness because his he is worship worth by Allah S.W.T.¹⁵

﴿يَتَأْتِيهَا الَّذِينَ ءَامَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلّٰهِ وَلَوْ عَلَىٰ
 أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللّٰهُ أَوْلَىٰ بِهِمَا
 فَلَا تَتَّبِعُوا الْهَوَىٰ أَن تَعْدِلُوا وَإِن تَلَوْتُمْ أَوْ نَعَرَضْتُمْ فَلِئِنَّ اللّٰهَ كَانَ
 بِمَا تَعْمَلُونَ خَبِيرًا﴾

Means: *Ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest*

¹³ Hadith. Ummu Salamah.

¹⁴ Hadith.

¹⁵ Sidi Ahmad Abdulah.1998. P. 7

*ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do.*¹⁶

This sentence explains that explanation and *syahadah* have to be given without bias even though contravene with personal benefits. Witness which is called to court is a witness who aim to establish justice for Allah S.W.T and not side with the people involve. Thus do not arise a witness who rebel against the side which make witness to support his case. Following Islamic system, all are responsible to establish justice absolute. Triumph in meaningful court case success establish justice and give right to that which indeed have the rights but not triumph to side rights from people who have the rights.¹⁷

People who have information and know the fact can give cooperation to the side of court whether by giving explanation or say explanation. If they reluctant it means them obedient do not command of Allah S.W.T. and they are being guilty.¹⁸

❖ وَإِنْ كُنْتُمْ عَلَىٰ سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَيْنِ مَّقْبُوضَةٌ فَإِنْ أَمِنَ
بَعْضُكُمْ بَعْضًا فَلْيُؤَدِّ الَّذِي أُؤْتِمِنَ أَمَانَتَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا تَكْتُمُوا
الشَّهَادَةَ وَمَنْ يَكْتُمْهَا فَإِنَّهُ عَاثِمٌ قَلْبُهُ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ



¹⁶ Al- Qur'an. Surah an-Nisa: 135

¹⁷ Sidi Ahmad Abdulah.1998. P. 7

¹⁸ Ibid. P. 7

Means: If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him fear his Lord. Conceal not evidence; for whoever conceals it, his heart is tainted with sin. And Allah knoweth all that ye do. ¹⁹

The above sentence already says clearly on the important of *syahadah* and explanation in the judicial process to establish Islamic justice. Besides al-Qura'n there are several as-Sunnah which explain detailed practical and process of judicial which happen to be peach Islamic early which say clearly importance explanation and proof in the process court case.²⁰

According to Abu Daud's story:

Hadith from Say'dina Ali say: the prophet has his massager to the state of Yaman to become Islamic judge. I also say to the prophet, yes prophet; master appointed me as the Islamic judge while I am still young and not knows on the judicial. The prophet says: In fact Allah S.W.T. will give a guide to your hart and decide your tongue. If come two men quarrel to sit in front of you, so your do not convict until you hear proof from the second side, same as you hear the first side, because that which more qualify to be done so that it is clear for you to convict. Say'dina Ali say: Since then I am unfounded doubt in convict. ²¹

This *hadith* say about the guide lines to the justices in court processing a case. A judge must have a broad mind to hear proof and explanation from every side which

¹⁹ Al- Qur'an Surah al-Baqarah: 283

²⁰ Sidi Ahmad Abdulah.1998. P 7

²¹ Hadith. Say'dina Ali.

quarrel. Fair and accurate in punishment unable to be burned, if explanation and proof do not be brought out clearly or side which quarrel not given opportunity which proper to suggest proof his truth and defend his right.²²

EXPLANATION FROM THE SITUATION

According to the opinion from the Islamic scholar says explanation from the situation is not one method of proof which can be recognized be to the bottom of Islamic laws. Nevertheless some *Fuqaha* receive explanation from the situation if do not have other proof. Ibnu Al-Qayyim and one from *'ulama* Maliki, Ibnu Furhun, is the two main supporters of this opinion.²³

According to the top explanation from the situation one method lawful proof in the all criminal and civil cases, except mistake in *Hadd*, even though mistake adultery provable against woman who get pregnant without marriage. There is also example to the other crime provable with explanation from the situation. For examples, the imposed of the liquor drinking on the basis of the smell of liquor on the breath of the accused, or the contents of the suspect's vomit in which liquor is found. These rules are hooker with 'Umar and Ibnu Mas'ud, two friend of the prophet. In the case of *Qisas* explanation from the situation already satisfy, when a man who get out of house with a knife on his hand and at the time one bloodshed corpse was found there and there no other people on that incident place, so the man who just running is the murderer. In a same case, Chief Alkali from Northen Nigeria, say that this proof "better from the explanation".²⁴

²² Sidi Ahmad Abdulah.1998. P 8

²³ Mohamed S.El-Awa. 1999. *Hukuman dalam Undang-undang Islam Satu Kajian Perbandingan*. Dewan Bahasa dan Pustaka. P. 195

²⁴ Ibid. P.195.

1.2: LITERAL AND GENERAL MEANING

AI-QARINAH: CIRCUMSTANTIAL EVIDENCE

Qarinah is a very important in evidence whether exist only other evidence such as witnesses, *iqrar* in situation does not have any evidence. According to *Qarinah*, court can reject a claim of poor people, which admitted a wing to wealth. In certain cases, witness evidence or *iqrar* is rejecting because of speculation such as son become witness for their father. *Iqrar* also is defining to those who are in unstable condition. *Qarinah* can be use when strong evidence exists from both sides. In situation which that no other evidence. *Qarinah* can be accepted the wholly evidence in making judgment, such as a wife who stay with her husband claim that her husband do not give livelihood. This accusation can be rejected according to Maliki and Hambali followers.²⁵

Qarinah means “together, accompany or related”. *Qarinah* also means a thing, which explains something. In the Arabic language, *Qarinah* can be divided in two types. The first type is the *Qarinah* base on metaphor known as the *Qarinah Maqaliah*, *Qarinah Lafziyyah* or *Qarinah Ma'nawiah*. For examples some one says, “I have seen a lion writing”. “A lion writing” here means “someone who is as fearless as a lion is writing”.²⁶

The second type of *Qarinah* is base on circumstance and surroundings. This is known as the *Qarinah Haliyyah*. The circumstances in this situation is to convey a certain meaning, as in the example of a man who says to his friend who is about to leave on a voyage, “May Allah protect you”. The words in this situation are spoken

²⁵ Sidi Ahmad Abdulah. P. 17

²⁶ Mahmud Saedon A.othman. 2003. *An Introduction to Islamic Law of Evidence*. Kuala Lumpur. The Open Press. Pp. 117.

in an atmosphere where the speaker express his wish that he could accompany his friend on the voyage”.²⁷

Base on the *Qarinah Maqaliyyah* and *Haliyyah* and the examples given above it is clear therefore that anything which points to a certain meaning, either in the form of words, circumstances, acts or omission are therefore *Qarinah*.²⁸

According to Dr. Wahbah Zuhaili *Qarinah* means: *Qarinah* from the angle language is an event which show meaning which be demanded. From the angle of terminology law, *Qarinah* is the marks born which related with hidden certain say. This definition must contain two events.²⁹

- (i) Exist event which be known need which become basic.³⁰
- (ii) There are connections with relations which connect between the events with born hidden³¹

Qarinah also means, marks or something that which become as a proof and exists or denies in certain.³²

²⁷ Mahmud Saedon A.othman. P.117

²⁸ Ibid. P. 117

²⁹ Sidi Ahmad Abdulah. P. 17

³⁰ Ibid. P.17

³¹ Ibid. P. 17

³² Dr. Abdul Karim Zaidan. 1993. *Prinsip-prinsip Pendakwaan Dan Pembuktian Dalam Sistem Kehakiman Islam*. Hizbi Shah Alam. P.

The definition given by ‘Abdul Karim Zaidan’ is needed wide and all embracing as it covers anything, which may be used as a proof or evidence to establish the existence or non-existence of a thing. This means that the existence or non-existence of a thing may be established by *Qarinah*. The word ‘thing’ that can be use as proof must be given a general meaning so that it would included things that could be seen, felt, heard, touched etc.³³

Examples:

A man emerges hurriedly out of a house in a state of fright holding a bloodstained knife. Upon investigation, it was found that there was a man in the house whose throat was slit. Base on circumstances, it could be inferred that the man who had left of the house was the murderer even though no witnesses were able to testify, that they saw the man committed the crime.³⁴

Base on the above examples it can be understood that the proving a murder can be done by the way of *Qarinah*.³⁵

According to ‘Abdul Mun’im Al-Bahai, the *Qarinah* which will be taken into account by the jurists is the one which is strong. The strong *Qarinah* is the *Qarinah* which may be use as a basis of deciding on a matter, or that it may be use as strong evidence.³⁶

³³ Sidi Ahmad Abdulah. P. 118

³⁴ Ibid. P. 118

³⁵ Ibid. P. 118

³⁶ Ibid. P. 119

In this context, the *Majalle* have mentioned that the *Qarinah* which will be used to prove a thing must have reached the status of *yaqin*.³⁷

A complete presumptive proof is an inference, which attains the degree of positive knowledge.³⁸

The status of *yaqin* mentioned by the *Fuqaha* however does not mean that an alleged fact must be proven beyond any shadow of a doubt. It is required that the *Qarinah* should reach the degree of *al-zan al-ghalib* or strong suspicion. This is because the presumptive evidence no matter how strong it is still carries with it an element of doubt.³⁹

It is therefore clear that even though the jurists had mentioned that the *Qarinah* must have reached or attained a standard of proof approaching *yaqin*, it need not be a *yaqin*, which is beyond any reasonable doubt because such a degree of certainty can only be attained through *iqrar* or *shahadah* evidence only. Further, such evidence could only be gained from a witness who is truthful because Allah only knows what is hidden in a man's heart whereas the judgment pronounced by a court is only made based on what is apparently plain.⁴⁰

The majority of *'ulama* have accepted *Qarinah* as one of the means of proof while there are also other *'ulama* that have rejected *Qarinah*. The majority who have accepted *Qarinah* are those from the four main schools of law. Their proof for admitting *Qarinah* as a type of evidence is based on the Qur'an, Sunnah and the

³⁷ Sidi Ahmad Abdullah. P. 119

³⁸ The *Majalle*. Article 1741.

³⁹ Mahmud Saedon A.othman. 2003. P.119

⁴⁰ *Ibid*. P. 119

practice of the Companions. They based their acceptance on the following authorities:⁴¹

(i) Allah says:

*Means: 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".*⁴²

According to Al-Qurtubi in his commentary, the jurists have employed this ayah as justification for using "signs which points to the existence of something" in solving *Fiqh* related problems i.e by using the circumstantial evidence of *gasamah* and others. In this context the '*ulama* are unanimous in their view that the Propheh Ya'qub (Jacob) a.s. have treated the bloodstained shirt of Yusoff a.s as evidence that Yusoff a.s. is still alive as the shirt though bloodstained is not torn as it should be if Yusoff a.s. was really attacked by wolves as had been claimed by his brothers. In one narration it was said that the Prophet Ya'qub a.s. had asked when told that his son Yusoff a.s. had been mauled by wolves, "When did wolves become so clear that they could eat Yusoff a.s. without tearing open his shirt?".⁴³

Base on the story above it clearly showed that the Prophet Ya'qub a.s had resorted to *Qarinah* as a means of proving that the allegations from the brother of Yusoff a.s are false. It is usually the case that a person who is mauled by wolves

⁴¹ Mahmud Saedon A.othman. 2003. P.120.

⁴² Al-Quraan Surah Yusoff: 18

⁴³ Mahmud Saedon A.othman. 2003. P.121

would have his shirt torn to pieces but this did not happen to Yusoff a.s and this fact clearly raises a doubt on the allegations coming from his brothers.⁴⁴

(ii) Allah says:

Means: 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 one who formed an evil design against thy wife, but prison or a grievous chastisement?" 25. 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! 26. "But if it be that his shirt is torn from the back, then is she the liar, and he is telling the truth!" 27. So when he saw his shirt, - that it was torn at the back - (her husband) said: "Behold! it is a snare of you women! truly, mighty is your snare! 28."⁴⁵

The fact that Yusoff a.s 's shirt was torn from the back shows that it is *Qarinah* leading to the conclusion that Yusof a.s did not try to molest Zulaikha, the wife of the nobleman.⁴⁶

(iii) It was also reported that the Prophet Sulaiman (Solomon) a.s once gave a decision base on *Qarinah*. It was said that he was once approached by two women carrying a baby and both woman were claiming that the children was theirs. The Prophet Sulaiman a.s than said to the effect, "Bring me a knife so that I will cut the children in half and I will give each half to each of you". The older woman agreed to this proposal

⁴⁴Mahmud Saedon A.othman. 2003. P.121

⁴⁵ Al-Qur'an Surah Yusof 12:25-28

⁴⁶ Mahmud Saedon A.othman. 2003. P.122

while the younger one said, “May Allah give His Mercy on you sir, please do not do such a thing as this children is mine”. Upon hearing such words, the Prophet Sulaiman a.s than gave a judgment that the children should be given to the younger woman.⁴⁷

Ibnu Qayyim then gave his own interpretation of the above case. According to Ibnu Qayyim:⁴⁸

We can never find any batter examples shown by the above *Qarinah* which is clear and evident. The fact that the older woman was ready to sacrifice the children to that in the end neither of them will get the child and the fact that the younger woman is ready to give up her claim to the children so as to guarantee the safety of the child shows that she was its rightful mother. This is because of the special bond of maternal love between mother and child as a result of caring the children during pregnancy and later giving birth to it. The *Qarinah* become clearer and stronger when the younger woman said, “this children is mine”.⁴⁹

The *‘ulama* have also argue that in several Sunnah of the Prophet S.A.W. we can fine example evidence to show that *Qarinah* may be use as one of the means of proof.⁵⁰

The Companions of the Prophet S.A.W had also on other occasions given their judgment on the basis of *Qarinah*.⁵¹

⁴⁷ Mahmud Saedon A.othman. 2003. P.122

⁴⁸ Ibid. P. 122

⁴⁹ Ibid. P. 122

⁵⁰ Ibid. P. 122

⁵¹ Ibid. P. 123

'Umar r.a had once imposed the *hadd* adultery on a woman who become pregnant without having a husband, according to the *Qarinah* which is self-evident. This is also the opinion of Imam Malik and one opinion of Imam Ahmad.⁵²

In another more amusing example, if we are to fine a men who is bare-headed while it using unusual for us to find him in such a state and there is another man running away from the scene clutching a turban in his hand then abstemiously the conclusion that we would draw from this a spectacle is that the men who was running away with the turban is actually by apparent *Qarinah* the thief of the bare-headed man's turban. This kind of *Qarinah* is stronger than *shahadah* or *iqrar*.⁵³

Similarly giving judgment base on the accuser's refusal to take an oath is no more than giving judgment base on apparent *Qarinah*. This is because an innocent man would surely take an oath affirming his innocence. If such a men refuses to take the oath, his reluctance would be *Qarinah* indicating the truth of the allegations of the plaintiff. In this kind of situation, the *Qarinah* is preferred on the person who originally was not liable for anything.⁵⁴

⁵² Mahmud Saedon A.othman. 2003. P.124

⁵³ Ibid. P. 124

⁵⁴ Ibid. P. 125

1.3 AI-QARINAH BASE ON AL-QUR'AN AS-SUNNAH

(i) evidence base on al-Qur'an

(a) Allah S.W.T commandment in the story of prophet Yusof a.s

وَجَاءُوا عَلَىٰ قَمِيصِهِ بِدَمٍ كَذِبٍ قَالَ بَلْ سَوَّلَتْ لَكُمْ
 أَنفُسُكُمْ أَمْرًا فَصَبْرٌ جَمِيلٌ وَاللَّهُ الْمُسْتَعَانُ عَلَىٰ مَا تَصِفُونَ ﴿١٨﴾

Means: 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".⁵⁵

Imam al-Qurtubi has said interpret *Fuqaha* has been valid with this sentence on practice marks and be taken if in the *fiqh* problem, like *al-Qasamah* and so on. They unanimous that Yusof a.s has been valid on top of the deceitfulness with what see him on the prophet Yusoff a.s shirt in the situation safe and do not tear until be storied he to say to them. "When the wolf become wise, he eats Yusof a.s and does not tear his shirt?⁵⁶

(b) The witness who that already mentioned by Allah about their witnesses in the story of Yusof a.s and Allah not obedient, but also is to story

⁵⁵ Al-Quraan Surah Yusoff 18

⁵⁶ Dr. Abdul Karim Zaidan. 1993. P 154

with ensconces, show to be taken count and do not be in vain *Qarinah*. Allah commandment in the surah Yusuf from the sentence 25-28.⁵⁷

وَأَسْتَبَقَا الْبَابَ وَقَدَّتْ قَمِيصَهُ مِنْ دُبُرٍ وَأَلْفَيَا سَيِّدَهَا لَدَا الْبَابِ قَالَتْ مَا جَزَاءُ مَنْ أَرَادَ بِأَهْلِكَ سُوءًا إِلَّا أَنْ يُسْجَنَ أَوْ عَذَابٌ أَلِيمٌ ﴿٢٥﴾ قَالَ هِيَ رَاوَدَتْنِي عَنْ نَفْسِي وَشَهِدَ شَاهِدٌ مِّنْ أَهْلِهَا إِنْ كَانَ قَمِيصُهُ قُدَّ مِنْ قُبُلٍ فَصَدَقَتْ وَهُوَ مِنَ الْكَاذِبِينَ ﴿٢٦﴾ وَإِنْ كَانَ قَمِيصُهُ قُدَّ مِنْ دُبُرٍ فَكَذَبَتْ وَهُوَ مِنَ الصَّادِقِينَ ﴿٢٧﴾ فَلَمَّا رَأَى قَمِيصَهُ قُدَّ مِنْ دُبُرٍ قَالَ إِنَّهُ مِنْ كَيْدِكُنَّ إِنَّ كَيْدَكُنَّ عَظِيمٌ ﴿٢٨﴾

Means: 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 one who formed an evil design against thy wife, but prison or a grievous chastisement?" 25. 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, and then is her tale true, and he is a liar! 26.

"But if it be that his shirt is torn from the back, and then is she the liar, and he is telling the truth!" 27. So when he saw his shirt, - that it was torn at the back - (her husband) said: "Behold! it is a snare of you women! Truly, mighty is your snare! 28."⁵⁸

So base on tear of the Yusuf a.s shirt, husband of the woman already can distinguish which is real from the false.⁵⁹

⁵⁷ Dr. Abdul Karim Zaidan. 1993.

⁵⁸ Al-Quraan Surah Yusoff 25-28

- (c) To verify the accusation they smear shirt Yusuf a.s with false blood-crack of the father say “not, but also your desire lie to you certain even (which not be accepted wits). If so my patient with his goodness and the Allah which be applied aid his on the any your that says: “According to al-Qurtubi, in his interpret say which *Fuqaha* has use this sentence as evidence to receive sign which show in the problem of *Fiqh* like *Qasamah* and so on.⁶⁰

The same opinion from Islamic scholar says which prophet Yaakub has use *Qarinah* as method prove falsehood accusation of his brother which prophet Yusuf been eaten by wolf. Instead prophet Yusuf has been killed. Accusation which prophet Yusoff has been eaten by wolf, determine his shirt will tear torn. But this does not happen to the shirt of prophet Yusuf. This situation arise hesitation on the truth of the accusation.⁶¹

(ii) Evidence base on as-Sunnah

Among the *Qarinah* of the prophet which His Majesty ever convict base on word expert *Qiafah* and His Majesty make expertise by *Qiafah* one of the proof sickle lineage. Do not have on here except only marks. Khulafa Al-Rasyidin uses this method that is with lesson part of *Qiafah* from the proof for sickle lineage, Imam Malik, Ahmad, Syafi’e and Islamic scholar. They also consider *Qiafah*, so this proof which *Qarinah* that is remain to be taken count. There are also in the *Sunnah Nabawiyah*, the prophet Muhammad’s has that should give him to people who

⁵⁴ Dr. Abdul Karim Zaidan. 1993.P. 154

⁶⁰ Sidi Ahmad Abdulah. P. 22

⁶¹ Sidi Ahmad Abdulah. P. 23

mention be done bottle shut and rope which be to do the restless fulfil as witness. This is the opinion from religious of Maliki's and his followers.⁶²

(a) Ab.Rahman b. Auf, story of which two Anzor man has come to the Rasullah. Respectively claimed that killed Abu Jahal. Rasullah enquires, "are you both have swept effect blood from your sword?" both of them answer "not yet". Rasullah decides which both killed Abu Jahal.⁶³

(b) Ibnu Abbas story that Rasullah speaks. "Widow has more rights to her self from her saint oneself while virgin needs to be requested her allowance to marry her. Keep quit is mark to allow her."⁶⁴

This *hadith* shows that the apostle to keep quiet a child girls when be requested agreement his as a *Qarinah* which show to mark her agreed. *Fuqaha* in Islamic judgment that should make this even as proof child girls agree when be a requested. Ibnu Farhun emphasize which this *hadith* can become the stronger proof on the should use of *Qarinah* as material proof.⁶⁵

(iii) Evidence by the result of judicial friends.

Umar Ibn al-Khattab has convicted without objection from the friend, by imposing adultery limit on the clear woman who pregnant without husband base on

⁶² Dr. Abdul Karim Zaidan. Pp 155-156

⁶³ Sidi Ahmad Abdulah. Pp 23

⁶⁴ Ibid.P. 24

⁶⁵ Ibid.P. 24

Qarinah which born. This opinion from Mazhab Maliki and Amad Ibn Hanbal according to story from he, Muhammad and Abdullah bin Mas'ud has convicted be the compulsory limit of liquor drink based of the smell or liquor on the breath of the accused, or the contents of the suspect's vomit in which liquor is found. This is also the opinion of Imam Maliki and his followers.⁶⁶

According to Ibnu al-Qayyim, Imam and his followers, Khulafa has convicted to cut hand against the burglar base on property which be stolen in the state of his owned. There are property steal in possession a *Qarinah* which stronger from the explanation and *iqrar*. Explanation and pledge contain two possibilities, whether real or lie. While there is property which is stolen in the mine is proof which not be worried.⁶⁷

Have one will feel doubt when seeing corpse of a bloodshed oval man. In his side another man just standing while holding a bloodshed knife, which man who stand up that's which kill him? And will know if both of them have hostility. Likewise, if we discover a man who not wearing "songkok", while familiarity has "songkok". In front of his another man uses "songkok" run by bringing different "songkok" be handed his. We punish which "songkok" which at hand man who run that is "songkok" which be taken from the man who not wearing the "songkok". This *Qarinah* stronger from the explanation and confession.⁶⁸

Convict base on averse to takes vows is base on *Qarinah* which born. If not because truth allegation the accusation must be punished by side which have to allege

⁶⁶ Dr. Abdul Karim Zaidan. P 156

⁶⁷ Sidi Ahmad Abdulah. P 25

⁶⁸ Ibid.P. 25

from oath. When a man has to allege averse takes vows. This is *Qarinah* born which show truth side which claim.⁶⁹

The generally accepted view is that circumstantial evidence (*Qarain*) is not one of the methods of proof recognized under Islamic law. At the same time, some jurists consider circumstantial evidence as an acceptable means of proof in the absence of others. Ibnu al-Qayyim and the Maliki scholar, Ibnu Farhun, are the two main representatives of this view.⁷⁰

Circumstantial evidence is a valid method of proof, according to the above authorities, in all civil and criminal cases except *hadd* offences, though the offence of *zina* may be proved against an unmarried woman if she is pregnant. There are other examples of criminal cases for which circumstantial evidence may be sufficient proof. Drinking, for example, may be proved by the smell of the breath of the accused or on his vomiting alcohol, a rule which is associated with ‘Omar and Ibn Masu’d the companions of the Prophet. In cases of *qisas*, circumstantial evidence is sufficient when a man runs out of house with a knife in his hand, a man bleeding to death is immediately found there, and there is no sign of any other possible assailant; in such a case the fleeing man is obviously the killer. In a similar cases, the Chief Alkali of Bida, Northern Nigeria, commented that this evidence was “batter than testimony”.⁷¹

The procedure of *Qasama*, again in the context of *qisas*, is a good example of circumstantial evidence being considered a justification for the swearing of oaths and inflicting *qisas* or exacting *diya*.⁷²

⁶⁹ Sidi Ahmad Abdulah. P 25

⁷⁰ Mohamed S. El-Awa. 1998. *Punishment in Islamic Law: A Comparative Study*. International Islamic Publishing House. P. 130.

⁷¹ Ibid.P.130

⁷² Ibid.P. 131

The Ibad school, usually referred to as a part of the Khariji sect, considers that Qara'in is proper evidence in cases of homicide. This view is based on a *hadith* according to which the prophet gave the booty of the murderer man, after the battle of Badr, to a member of the Muslim army because of circumstantial evidence that he had killed the enemy. To this view some contemporary scholars give a good deal of credence. However, this view has not traditionally been supported, since the Sunni schools generally hold to the testimony of two male witnesses.⁷³

The arguments put forward by Ibn al-Qayyim and Ibn Farhun may at least dispel the notion that Islamic law does not recognize circumstantial evidence in its formulation of the law of evidence. But where circumstantial evidence is the only method of proof available, the court must take all possible precautions to avoid injustice or misjudgement. When definite evidence is almost impossible, writes one Hanafi jurist, the nearest to it must be accepted.⁷⁴

It is interesting that according to Qarafi, the famous Maliki jurist, circumstantial evidence may be considered only by the court of the *wali al-jara'im*, or the official in charge of crimes. But another Maliki authority, Ibn Farhun, considers that the ordinary Syariah court or the *qadi* may also take circumstantial evidence by the very strong argument of Ibn al-Qayyim and by his conclusion that the final purpose of the law of God is to establish justice among people; therefore whatever means need to be employed for this are legitimate.⁷⁵

⁷³ Mohamed S. El-Awa. 1998P. 131

⁷⁴ Ibid.P. 131

⁷⁵ Ibid.P. 131

CHAPTER TWO

QARINAH BASED ON OPINION OF ISLAMIC SCHOLARS

2.1 OPINION OF THE ISLAMIC SCHOLAR ON QARINAH

Most of the Islamic scholar receives *Qarinah* as one of the method such a proof in the court. Nevertheless, there is also having a group from Islamic scholar who reject *Qarinah*. The group that which receive *Qarinah* as a tool of evidence in the court is the group of Islamic religious scholar of four Mazhab. Some of the case which already are done by them are: ¹

- a) They are unanimous enable a husband make a sexual relationship with woman who be given to him on night bridegroom even though do not have witness which the above woman is wife who be means during marriage contract. In this situation the result is base on *Qarinah*.²

- b) They are unanimous say people who discover meat sacrifices that have his side on the everyday sacrifice edible even though do not have people give to him. This is base on *Qarinah* which born.³

¹ Sidi Ahmad Abdulah.1998.**Pembuktian dan Keterangan dalam Undang-undang Islam Rujukan Khusus Kepada Qarinah**. Penerbit Universiti Malaya. P 20

² Sidi Ahmad Abdulah.1998. P 20

³ Ibid. P 21

- c) They are unanimous receive accusation a woman who make adultery
Because of pressure when the above woman gives hopeful to the man or if
there is effect like scream or so on.⁴
- d) They unanimous also enable house-renter brings his guest and stay overnight
on his house, even though not included in rental agreement. This is also is base
on *Qarinah*.⁵

This example explains on the acceptance *Qarinah* as a tool of proof. In generally Islamic scholars already use *Qarinah* in their judgment. This situation shows which they receive *Qarinah* as a tool of evidence in the court. Although the Islamic scholars not discuss separately on other, event like, *kitabah*, *syahadah*, *oath* and so on. This is already arise hesitation against the confrontation opinion among *Fuqaha*.⁶

Basically there are two opinions on the acceptance of *Qarinah* as one of the proof material:⁷

First: should accepted *Qarinah* as one of the tool proof. Some of the Islamic scholars that support this opinion are like Ibnu Taimiah, Ibnu al-Qayyim from Mazhab Hambali, al-Qarafī, Ab. al-Muniem b. al-Faras, Ibnu Farhun and Ibnu Jauzi from Mazhab Maliki, Ibnu al-Gharas, az-Zailaie and Ibnu Abidin from Mazhab Hanafi.⁸

⁴ Sidi Ahmad Abdulah.1998. P 21

⁵ Sidi Ahmad Abdulah.1998.P 21

⁶ Ibid. P 21

⁷ Ibid. P 21

⁸ Ibid. P 21