

Circumstantial Evidence and Its Admissibility in Criminal Proceedings: A Comparative Analysis of the Common Law and Islamic Law Systems

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Abstract

There are two basic forms of evidence that may be admitted in courts of law; one, direct evidence which does not require any inference to arrive at a conclusion to be drawn from the evidence, and this includes eye witness and confession, and two, indirect evidence which is also known as circumstantial evidence, which requires an inference to be made in order to arrive at a conclusion to be drawn from the evidence. The perception among the public is that circumstantial evidence is an inferior form of evidence which carries less weight than direct evidence. One sometimes hears persons who have been convicted of an offence affirm their intention to appeal against a conviction as the evidence was only circumstantial. The situation is worse when it comes to its admissibility under Islamic law. The general perception is that circumstantial evidence is inadmissible in criminal proceedings under Islamic law system. This paper, therefore, examines the significance and admissibility of circumstantial evidence in criminal proceedings. It makes a comparative analysis of the Common law and Islamic law systems. It finds out that circumstantial evidence is admissible in all cases in Common law system, while in Islamic law system; Muslim jurists hold different views with regard to its admissibility in *Huduud* and *Qisaas* cases. It draws a conclusion that although Muslim jurists hold different views, the soundest view is its admissibility in all cases including *Huduud* and *Qisaas*. This is because what is important in a conviction is proof which satisfies court that the accused is guilty of the crime against him or her, and circumstantial evidence is among the proof. As a general rule, the value of circumstantial evidence lies in its cumulative value; while a single item may not be enough to satisfy court of the guilt of the accused, several items taken together may carry enough probative force to justify a conviction.

Keywords: indirect evidence, circumstantial evidence, inference, *Huduud*, *Qisaas*, cumulative value, probative force.

1. Introduction

For a person to be convicted under both Common Law and Islamic law systems, there must be sufficient evidence to satisfy court of the guilt of the accused.

There are two basic kinds of evidence that may be admitted in courts of law: one, direct evidence which does not require any reasoning or inference to arrive at the conclusion to be drawn from evidence, such as eye witness, and two, indirect evidence, also known as circumstantial evidence, which requires that an inference be made between the evidence and the conclusion to be drawn from it.¹

The perception among the public is that circumstantial evidence is in some way an inferior form of evidence. "One sometimes hears", as Emson puts it, "persons who have been convicted of an offence or their relatives or their lawyers affirm their intention to appeal against a conviction as the evidence was only circumstantial".²

The situation is worse when it comes to admissibility of circumstantial evidence under Islamic law. The general perception is that circumstantial evidence is inadmissible under Islamic law.

This paper examines the significance and admissibility of circumstantial evidence in criminal proceedings. It makes a comparative analysis of the Common Law and Islamic law Systems.

The original East African countries, i.e. Uganda, Kenya and Tanzania are former Colonies of Great Britain and much of the philosophy which underlies the nature and make up of their legal system is derived from the latter. This therefore means that the legal system of these countries is based on English Common Law.³

Given this background, the paper has cited a number of decided cases from Uganda, Tanzania and East African Court of Appeal in relation to admissibility and weight of circumstantial evidence in Common law.

2. Definition of Circumstantial Evidence under Common Law

Black's Law Dictionary defines circumstantial evidence as evidence based on inference and not on personal knowledge or observation.⁴

Osborn's concise Dictionary defines Circumstantial evidence as a series of circumstances leading to the

¹ www.criminallawconsulting.com/circumstantial-vs-direct-evidence.html. Accessed on 24/10/2017.

² Emson, R. (2004). Evidence. 2nd Edition, New York, Palgrave Macmillan, p. 11.

³ Mahoro, B. (2016). Uganda's legal system and legal sector, available at: www.nyulawglobalex/uganda1.html. accessed on 12/4/2017.

⁴ Black, H.C. (1990). Black's law Dictionary. West Publishing Company, p.243.

inference or conclusion of guilt when direct evidence is not available.¹

Taylor A. (2000), defines it by saying: “It is evidence which falls short of directly establishing a fact in issue, but which is admissible by reason of its relevance to the fact in issue.”²

He illustrates his definition by saying: “A particular set of circumstances may lead to the appropriate inference being drawn; for example, nobody saw the accused in *fragrante delicto*, but he was seen in the area just before the victim, against whom he was known to have borne a grudge, was murdered, and his finger prints were found at the scene of the crime. The inference to be drawn from these circumstances is that the accused was the murderer, even though no one saw him do it, and there is no direct evidence, only circumstantial evidence, that it was him.”³

Emson R. (2004), states that: “An item of circumstantial evidence is an evidentiary fact from which an inference may be drawn rendering the existence or non existence of a fact in issue more probable. The fact in issue is not proved by a witness relating what he directly perceived. So circumstantial evidence is indirect evidence.”⁴

Thus, circumstantial evidence is evidence of facts or circumstances from which the existence or non existence of a fact in issue may be inferred. It is any evidence that requires some reasoning or inference in order to prove a fact. It is evidence which strongly suggests something, but does not exactly prove it. It helps people draw inferences about a fact, or the events that took place.

Nearly anything can be used as circumstantial evidence, so long as it helps create a picture of the incident or crime, leading the judge or jury to a valid conclusion. Facts that do not necessarily prove a defendant’s culpability, such as prior threats made to the victim, fingerprints found at the scene of the crime, testimony that a neighbor saw the defendant in the neighborhood, or the fact that the defendant was the beneficiary of the victim’s life insurance policy, are all circumstantial evidence. Even in the absence of an eye witness to the crime, these pieces of evidence, when taken together, certainly lead to the conclusion that the accused is guilty.⁵

If a pocket handkerchief found dropped at the scene of a crime bears a name on it, it is likely to be owned by a man bearing that name. Evidence of the name on the handkerchief would be admissible to link its owner with the crime.⁶

Examples of circumstantial evidence include motive or plan, knowledge, capacity, opportunity, suspicious behaviour, lies, preparatory acts, previous conduct, possession of incriminating articles, absence of explanation, failure to give evidence or call a witness, finger prints, bodily samples, DNA tests and tracker dogs.⁷

In *R. v. Lydon, (sean)*⁸, two pieces of paper were found close to a gun found beside the road taken by the gateway car used by the robbers of a post office. On one was written “sean rules” and on the other “sean rules 85”. One of the two accused was named Sean. It is wholly uncertain whether the identifying document was written by the accused or by another. It was held that the evidence of the piece of the paper was not hearsay, but was rather material which the jury could use as circumstantial evidential evidence of the accused’s presence.

3. Weight of Circumstantial Evidence Under Common Law

Some types of circumstantial evidence are inherently cogent, whereas other types may have very little probative value.⁹

In *Uganda v. Albina Ajok*¹⁰, the case rested mainly on circumstantial evidence and it was stated quoting the case of *R. v. Taylor (1928) 21 cr. app R 20*:

Circumstantial evidence is very often the best evidence. It is evidence by surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. However, circumstantial evidence has to be approached with caution because, as pointed out by lord Normand in the case of *Teper v. R (1952) AC 480, 489*, ‘Evidence of this kind may be fabricated to cast suspicion on another...it is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference’.

Thus, so long as the possibility of fabrication can be discounted, circumstantial evidence may be more reliable than direct testimony.

¹ Bird, R. (1983). Osborn’s concise law dictionary, 7th Edition, London, Sweet and Maxwell, p. 73.

² Tailor, A. (2000). Principles of Evidence, 2nd Edition, London, Cavendish publishing limited, p. 3.

³ Ibid.

⁴ Emson, R. (2004). Evidence, p. 10.

⁵ <https://legaldictionary.net/circumstantial-evidence>. Accessed on 23/10/2017.

⁶ Howard, M.N, Crane, P. & Hochberg, D. (1990). Phipson on Evidence, 14th Edition, London, Sweet & Maxwell, p. 574.

⁷ Roberts, P., & Zuckerman, A. (2004). Criminal Evidence, 1st Edition, New York, Pg. 183. See also: Cross, R.& Tapper, C. (1990). Cross on Evidence. 7th Edition, London, p. 20 – 40.

⁸ (1987) 85 Cr. App. R. 221.

⁹ Emson, R. (2004). Evidence, p. 11.

¹⁰ (1974) H.C.B. 176.

However, as stated above, some types of circumstantial evidence may not be not carry enough weight to convince court on that particular fact.

In the case of *Kasaja son of Tibagwa v. R*¹, the East African Court of Appeal was unable to sustain a conviction for murder where the incriminating evidence consisted of the fact that the accused's spear had been found near the body, and that the accused had not answered the alarm upon the sounding of which it was the duty of all villagers to turn out.

As a general rule, the value of circumstantial evidence lies in its cumulative effect, that is to say, while a single item of circumstantial evidence may only slightly increase the likelihood that the accused is guilty, several items taken together may carry enough probative force to justify a conviction.²

In the case of *Makungire Mtani v. R*³, Makungire (the appellant) and one another person (Muzungu) were jointly charged with murder of the deceased. Muzungu, however, died in remand before the hearing started, and so the trial proceeded in respect of the appellant alone. He was convicted basing on circumstantial evidence of mysterious disappearance of the deceased from the company of the appellant, silence of the appellant in his defense during trial, blood stains of the deceased's blood group found on the appellant's clothes, and incriminating circumstances in a murder charge. He was then sentenced to death. The appellant's advocate contended among other things that the prosecution evidence was highly circumstantial to support a conviction, and that the learned trial Judge misdirected himself as the burden of proof.

It was held that:

- a) In the circumstances of the present case, there was more than considerable suspicion against the appellant; for he refused to give an explanation of how the deceased mysteriously disappeared from his company.
- b) We think that the evidence of the appellant's clothes bearing blood stains of the sample blood group as the deceased but different from his own was an incriminating circumstance which was properly taken into account in establishing the appellant's guilt.

4. Convicting a Person under Common Law basing on Circumstantial Evidence.

Before convicting any person basing on Circumstantial Evidence, the incriminating facts must be incompatible with the innocence of the accused or guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In the case of *Charles Kayemba v. Uganda*⁴, the court of appeal held *inter alia* that:

Where circumstantial evidence is inconsistent with innocence of an accused person and cannot be explained with any other reasonable hypothesis than that of guilt, then the accused is to be convicted.

In the case of *Protas John Kitogole and another v. Republic*⁵, the appellants were charged and convicted of murder by the Tanzanian High Court. The case against both accused/ appellants was base wholly on circumstantial evidence. The pieces of circumstantial evidence tending to implicate the second were:

- a) After the two deceased watchmen had been fatally wounded, he was found at the home he was staying with a big fresh cut wound which was bleeding.
- b) A trail of blood was traced from there right up to the carpentry workshop where the murders were committed. The appellant's explanation that the cut wound was inflicted on him by bandits who had invaded the home was not backed by any evidence.
- c) On the fateful night, some 14 carpentry planes were stolen from the workshop, and six days later the appellant told PW5, a relative, that he had carpentry planes for sale but cautioned him not to disclose this to anyone because theft of carpentry planes had taken place at Tosamaga.
- d) Just about six days prior to the commission of the murders, the same workshop had been broken into and a welding machine (electric motor) was stolen from there but was later found abandoned only about nine metres away. In the dead of the same night, the appellant had approached PW4 and asked him for a motor vehicle to transport a motor from a workshop. Sensing that the said motor was stolen PW4 refused to oblige.

As for the first appellant, there were the following pieces of circumstantial evidence:

- a) The appellant's companionship with his co appellant.
- b) The appellant's girl friend said that five to six days following the murders, she visited the appellant's home where she noticed the appellant with a big cut wound on his lower arm, the wound was not fresh. He threatened to kill her if she told people about the wound. She went on to say that the appellant used to put on T/shirts but that after the murders he used to put on a long sleeved shirt and a big coat.

¹ (1952) 19 E.A.C.A. 268

² Emson, R. (2004). Evidence, p.11.

³ T.L.R (1983) C.A. 179

⁴ (1986) H.C.B. 9.

⁵ T.L.R. (1992) C.A. 51.

- c) The appellant claimed that he sustained the cut wound when he was trying to commit adultery with some one's wife. However, there was no evidence to that effect.

The court of appeal considered whether or not the pieces of circumstantial evidence could ground a conviction in respect of each appellant.

It was held:

- i) The fact that only shortly after the murders were committed, the second appellant was found with a big cut wound and that a trail of blood was traced from where he was found to the scene of the murders were incriminating circumstances which lead to the only reasonable inference that the appellant took part in the murders. And the fact that the second appellant gave a false account of how he sustained the injury goes to strengthen this view.
- ii) Although the evidence against the second appellant was a great deal stronger than that against the first appellant, we are fully satisfied that the circumstantial evidence against the first appellant was enough to lead to the irresistible conclusion that he was one of the killers.

In *Nazir Ahmad v. R*¹, the appellant was convicted for the theft of three motor cars. Finger prints had been found on various parts of the car which had been stripped of wheels, tyres, starter motors and lamps. On appeal the conviction was upheld because the possibility that the finger prints had been placed there by accident or by an innocent person was too remote to warrant serious consideration.

5. Definition and basis of admissibility of Circumstantial Evidence under Islamic Law

Under Islamic law, circumstantial evidence refers to admissibility of *Alqara'in*.

The term *Alqara'in* is plural of *Alqariinah*, which literally means connection, conjunction, relation, presumption, inference or indication². In the language of the law, the word *Alqariinah* refers to something which surrounds an event and serves as a sign for the existence or non existence of something³. In other words, it is something surrounding an event from which a legal inference can be drawn for the existence or non existence of something.⁴

Thus, circumstantial evidence and *Alqariinah* are both synonymous and refer to circumstances surrounding an event from which an inference can be drawn for existence or non existence of the issue under investigation.

The basis of admissibility of circumstantial evidence under Islamic law is found in both the Qur'an⁵ and the Sunnah⁶ of the Prophet (S.A.W).

In the Qur'an, Allah says:

*They said: 'Our father, we went racing with one another and left Yusuf by our belongings and a wolf devoured him, but you will never believe us even if we speak the truth'. And they brought his shirt stained with false blood. He said: 'Nay, but your own selves have made up a tale'*⁷

The verses are about the story of Prophet Yusuf and his brothers who threw him into a well because of being the most beloved son to their father. After throwing him into the well, they came back in the evening weeping. They told their father that they had left Yusuf guarding their belongings and went racing with one another. As they were away, a wolf came and devoured Yusuf. They brought his shirt stained with false blood to convince their father that the blood was a result of the wolf devouring Yusuf. Their father based on circumstantial evidence to disprove their tale as he looked at Yusuf's un-torn shirt and said: "When did the wolf become so intelligent so as to remove Yusuf's shirt un-torn before devouring him?"⁸ That is why he said: "Nay but your own selves have made up a tale".

*Allah also says: 'Yusuf and the woman raced towards the door one behind the other and she tore his shirt from behind. In the process they met her husband at the door. On seeing him she cried out: 'what punishment does one deserve who shows evil intentions towards your wife? What else than he should be put in prison or tortured with painful torment'. Yusuf said: "It was she that seduced me". At this moment, a witness of her own folk testified saying: "If his shirt is torn from the front, then her tale is true and he is a liar, but if his shirt is torn from the back then she has told a lie and he is speaking the truth". When her husband saw Yusuf's shirt torn at the back, he said: "Surely it is a plot of you woman, certainly mighty is your plot"*⁹.

The verses are about the story of Prophet Yusuf and his master's wife. The woman after closing all the doors of the house, tried to seduce Yusuf into evil. Prophet Yusuf instead refused and rushed to open the door.

¹ (1962) E.A. 345.

² Albalabakki, R. (1997). *Almawrid Arabic English Dictionary*. 10th Edition, Beirut, p.859. see also: Qala'ji M. and Qunaibi, H. (1988). *Mu'jam Lugatul – Fuqaha Dictionary of Islamic Legal terminology*. 2nd Edition, Daar Annafa'is, p.362.

³ Azzahraani, S. (1994). *Tara'ikil-Hukum fi Shariatil- Islaamiyyah*, 2nd Edition, Jeddah, p.328.

⁴ See: Anwarullah, P. (2004). *Principles of Evidence in Islam*. 2nd Edition, Kuala Lumpur, A.S. NOORDEEN, p. 107.

⁵ The Qur'an is the word of Allah revealed to Prophet Muhammad, and is the primary source of Islamic Law.

⁶ Sunnah refers to sayings, deeds and approvals of the Prophet Muhammad, and is the second source of Islamic law.

⁷ Surat Yusuf (12: 17- 18).

⁸ See: Al-Qurtubi, A. (1964). *Alja'mie Li Ahkaamil Qura'n*. 2nd Edn, Cairo, Daar Al-Kutub Al-Masriyyah, Vol 9, p. 99.

⁹ Surat Yusuf (12:25 – 28).

The woman decided to race with him and pulled him from behind. In the process she tore his shirt from behind. As they reached the door, they found Yusuf's master. The woman tried to accuse Yusuf of trying to do evil to her, but Yusuf defended himself by counter accusing her that she was the one who was trying to seduce him. As neither of the two had evidence to support his/her claim, a person from among her own folk adduced circumstantial evidence to prove the fact in issue. He said that look at his shirt, if it be that it is torn from the front, then that would be enough evidence for her that Yusuf was trying to do evil to her and as she was trying to defend herself she tore his shirt from the front. But if it be that his shirt is torn from the back, then that would be enough proof for Yusuf that as he was trying to escape from evil, she tried to pull him from behind and as a result his shirt got torn from the back.

The master (the wife's husband) relied on circumstantial evidence of the shirt being torn from the back, to prove that the woman was telling lies, and that is why he said: "Surely it is a plot of you women, certainly mighty is your plot".

If it be mentioned that the verses refer to laws of Prophets before Prophet Muhammad and therefore are not his laws, it can be argued that the laws of Prophets before Muhammad (S.A.W) are also his laws unless it has been made clear in his revelation that those laws have been abrogated.¹

In another verse, Allah says: '*You may know them by their mark they do not beg of people at all*'²

The verse talks about a group of people who are in need and destitute but they do not go on begging people at all. The ignorant people assume them to be rich because of their modesty. But Allah directs the prophet to use circumstantial evidence of their humbleness, humility and modesty to know them such that they can receive assistance from Swadaqah (*Zakah*).

These verses form the basis of admissibility of circumstantial evidence from the Qur'an.

In the Sunnah, Abu Hurairah reported that the Holy Prophet (S.A.W) said: '*There were two women who had small sons. A wolf came and took away the son of one of them. The elder of the two women said to the younger: 'it was your son.' The younger said: 'No it was your son.' They brought their dispute to Prophet Daud who decided the case in favour of the elder one. The young one was not satisfied with the decision and appealed to Prophet Sulaiman, who ordered for a knife to make two pieces of the child so as to give one piece to each of them. The elder one accepted that the child be cut into two pieces for each of them, but the younger one cried and said to Sulaiman: 'May Allah grant you mercy, do not cut the child into two pieces, he is the son of the elder.' When Sulaiman heard of this, he decided the case in favour of the young one.*'³

Prophet Sulaiman decided the case basing on circumstantial evidence of the young one crying: "Do not cut him into two pieces; he is the son of the elder one." This implied that the child belonged to her and therefore she wanted to save its life, while the elder one wanted the child to be cut into two since she had lost hers so she wanted also the younger one to lose hers.

6. Convicting a Person under Islamic Law Basing on Circumstantial Evidence.

Under Islamic law, offences are classified into three categories, namely *Huddud*, *Qisaas* and *Taziiir*.

Huduud are offences whose punishments have been prescribed by the Qur'an and Sunnah. The punishments in *Huduud* embody three main aspects; the first is that these punishments are prescribed in public interest, the second is that they are fixed and cannot be lightened nor made heavier, and the third is that after having been reported to the courts of law they cannot be pardoned either by the judge, or by any political authority, or by the victim of the offence.⁴ These offences are six, namely; illicit sexual relations, armed robbery, theft, drinking of alcohol, slanderous accusation of illicit sexual relations, and apostasy.⁵ Offences in this category violate what is called *Huquuq Allah* (Rights of Allah) i.e. they affect the general public.⁶

Qisaas are offences whose punishments have been prescribed by the Qur'an and Sunnah, but can be remitted by the person offended against or his near relatives. They are applicable to offences of murder and injury.⁷ Offences in this category violate what is called *Huquuqul Adamiyin* (Rights of human beings)⁸ and that is why they can be remitted by the person offended against or his near relatives.

Taziiir are offences whose punishments were left to discretion of the court in regard to the form and measure in which such punishments are applied.⁹ Examples of these offences include cheating in business, telling lies, rumor mongering and contempt of court.

Given that classification, Muslim jurists are of three different views regarding convicting a person basing

¹ Ashinkitwi, M. (1995) *Adhuwa'ul Baya'n fi idhahil- Qura'a bil- Qur'an*, Beirut, Daar Al-Fikr, Vol 3, p. 170.

² Surat Al-baqara (2:273).

³³ Bukhari, Swahihil – Bukhari, vol 8, p.501, and Muslim, Swahih Muslim, Hadith no. 1720

⁴ El Awa, M.S. (2001). *Punishment In Islamic Law, A comparative study*. 1st Edition, New Delhi, Markazi Maktaba Islami Publishers, p. 15.

⁵ Ibid p. 16.

⁶ Mayanja, S. J. (2014). *The Islamic Legal Maxims, A critical analysis*. 1st Edition, Zanzibar, University College Printing Press, p. 110

⁷ Siddiqui, M. (2003). *The penal law of Islam*. Delhi, Adam publishers and distributors, p.44.

⁸ Mayanja, S. J. (2014). *The Islamic Legal Maxims, A critical analysis*, p. 111.

⁹ Ibid p. 45.

on circumstantial evidence and these are:

- a) Circumstantial evidence is admissible and can be based on in convicting a person in all offence including *Huddud* and *Qisaas*. This view is based on the tradition of the Prophet which says: '*If people's claims were accepted on their face value some persons would claim other people's blood and properties but proof should be adduced by one who makes a claim.*'¹ They argue that proof is whatever brings the truth to light and circumstantial evidence can be part of the proof.
- b) Circumstantial evidence is not admissible in offences of *huduud* and *qisaas*. It is only admissible in offence of *taazir*. This means that a person cannot be convicted of crimes of *huduud* and *qisaas* basing on circumstantial evidence. This is the view of majority of Muslim jurists.²

The view is based on the following:

- i) The prophet (S.A.W) said: '*Avoid application of huduud punishments as far as possible. If you find a way out for a Muslim without applying hadd³ to him, you should set him free for it is better for a judge to error in pardon than to error in punishment.*'⁴
- ii) The prophet (S.A.W) said: '*If I were to stone any one without proof, I would have stoned so-and-so (fulanah), for her speech, appearance and cohabitation are such which raise suspicion.*'⁵

The two *hadiths* reinforce the rule that doubt nullifies *huduud*, and since circumstantial evidence is always doubtful, it cannot be a basis for judgments in *huduud* which are removed by doubts.⁶ Thus, a person cannot be convicted of crimes of *huduud* and *qisas* basing on circumstantial evidence.

- c) Circumstantial evidence is not admissible in crimes of *huduud* and *qisaas* apart from two, namely:
 - i) Adultery and fornication which can be proved by pregnancy of an unmarried woman if there is no claim of coercion.
 - ii) Alcohol drinking which can be proved by its smell.

This view is based on:

- i) Umar the second *Khalifah*'s statement when he said that Adultery is proved when pregnancy appears or confession is made.⁷
- ii) Umar, Uthman and Ibn Masuud applied *Hadd* of drinking alcohol to whoever was found smelling alcohol or vomited it basing on circumstantial evidence.⁸

7. Discussion

By analyzing the three fore mentioned views, the soundest one is the first one which states that circumstantial evidence is admissible and can be based on in convicting a person in all wrongs including criminal offences in Islam, whether they fall under the category of *Huduud* or *Qisaas* or *Taazir*. This is because what is important in a conviction is proof or evidence which satisfies court that the accused is guilty of the crime against him or her. Circumstantial evidence is one of those proofs which can satisfy court of the guilt of the accused.

It was reported that Anas bin Malik said: The first *lia'n*⁹ in Islam was when Hilaal bin Umayyah accused Shariik bin Asshahma' of committing adultery with his wife. He came to the Prophet and reported the case. The Prophet said: "Bring four witnesses otherwise you will receive the Hadd punishment on your back"¹⁰ and he repeated that several times. Hilaal said to him: 'By Allah oh messenger of Allah, Allah knows that I 'am telling the truth and He will certainly reveal to you that which will spare my back from Hadd'. While they were like that, the verse of *Lia'n* was revealed (And for those who accuse their wives but have no witness except themselves...)¹¹ He called Hilaal and he testified four times by Allah that he was telling the truth, and the fifth time he invoked the curse of Allah upon himself if he were lying. Then the Prophet called the woman and she testified four times by Allah that he (her husband) was lying. When it came to the fifth time, the Prophet said: "Stop her; for it will inevitably bring the punishment of Allah upon the liar". She hesitated until we thought that she was going to confess. Then she said: 'I will not bring disgrace to my people' then she went ahead with the

¹ Albaihaqi, (1994). *As-Sunan Al-Kubra*, Makkatul-Mukarramah, Maktabat Daarul-Baaz, Vol: 10, p.252

² Azahrani, S. (1994). *Taraikil – Hukum Fi Shariati- Islamiyah*. 2nd Edition, Jeddah, Maktabat Aswahaabah, p. 341.

³ *Hadd* is singular of *huduud*.

⁴ Albaihaqi, (1994). *As-Sunan Al-Kubra*, Vol. 8 p. 238

⁵ Bukhari, *Swahihil-Bukhari*, vol 7, pg 177, Ibn Maajah, *Sunan Ibn Maajah*, vol 2 p. 855.

⁶ Anuwarullah, P. (2004). *Principles of evidence in Islami*, p.111.

⁷ Muslim, *Swahih Muslim*, Hadith no. 1691.

⁸ Saedon, M. (1996). *An Introduction to Islamic Law of Evidence*. Shah Alam, HIZBI, p. 124.

⁹ *Lia'n* is the Islamic court proceeding of separation between a husband and his wife after one has accused the other of adultery, but has no witness except him or herself. Each one of the two makes four oaths and one curse upon oneself if one is telling lies. This is meant to support one's own truthfulness. The four oaths stand for four witnesses in order to prove the charge of adultery. Upon taking the oath, the Qadhi or Judge orders for separation between them. See: Siddiqui, I.M, (2005). *The Family Laws of Islam*, New Delhi, Adam Publishers and Distributors, p. 225.

¹⁰ *Hadd* punishment for slanderous accusation of illicit sexual relations.

¹¹ Surat *Annuur* (24: 6)

oath. The Prophet said: “wait and see if she produces a child who is white with straight hair and long eye lashes, then he belongs to Hilaal bin Umayyah. But if she produces a child who is dark with curly hair, of average size with narrow calves, the he belongs to Shariik bin Asshahma”’. She produced a child who was dark with curly hair, of average size and with narrow calves. The Prophet said: “Had not the matter been settled by the book of Allah, I would have punished her severely”¹. This hadith is a clear indication that if the matter had not been settled by *lia'n*, i.e. if the husband and the wife had not taken the oath, then the Prophet would have used circumstantial evidence of the resemblance of the child to the accused man to apply the Hadd punishment to the woman. This hadith also serves as a basis for acceptance of DNA test in the modern era of technology, which is also a form of circumstantial evidence.

In Common Law, the standard of proof in criminal cases must be beyond reasonable doubt as mentioned in *Woomington v. DPP*², *Miller v. Minister of Pensions*³ and *Uganda V. Dic Ojok*⁴. This is also true with cases of *Huduud* and *Qisaas* under Islamic law and this is why when a man came to the Prophet and said: ‘*Oh Messenger of Allah I have committed adultery*’, the prophet turned away, until the man confessed four times. The Prophet called him and asked him: “*Are you mad?*”, The man said: ‘*No*’. The Prophet said: “*Perhaps you just kissed her or embraced her*”. The man said: ‘*No, by Allah I committed adultery*’. The prophet reached the extent of asking the man’s relatives about the state of his mind and they said: ‘*We do not know of any ailment of his except that he had committed something about which he believes that he would not be able to relieve himself of its burden but with hadd*’. The prophet then ordered him to be stoned.⁵

It can be argued that it is not true that circumstantial evidence is always doubtful. Circumstantial evidence can sometimes amount to overwhelming proof of guilt. As a general rule, the value of circumstantial evidence may only slightly increase the likelihood that the accused is guilty, several items taken together may carry enough probative force to justify a conviction.

A clear example is where the accused had the opportunity to commit a burglary and items taken from the burgled house found in his lock-up garage and a finger print recovered from the window forced by the burglar with fifty previous convictions for house breaking.⁶

It can also be argued that if circumstantial evidence is susceptible of doubt, so is the testimony of witness and it should, therefore be judged in the same manner. Indeed testimony by a witness may be more susceptible to illusions, lies and errors than circumstantial evidence. Thus circumstantial evidence can have at least as much validity as testimony by witnesses.⁷

8. Conclusion

From the foregoing discussion, it can be concluded that circumstantial evidence is admissible under both Common Law and Islamic Law systems.

In Common Law, circumstantial evidence is admissible in all cases, while in Islamic law it is admissible in cases of *Taa'zir* by all Muslim jurists. It is only contentious in cases of *Huduud* and *Qisaas* where Muslim jurists hold different views. It has been seen however, that the soundest view is the admissibility of circumstantial evidence in all cases including *Huduud* and *Qisaas* if it is of such a nature as to satisfy court of the guilt of the accused, that is, if it proves beyond reasonable doubt that the accused is guilty.

Circumstantial evidence is of many types, some of which are cogent and convincing, while others have very little probative value. Therefore, caution must be taken to admit only those which are highly probative and cogent to satisfy court beyond reasonable doubt of the guilt of the accused.

As a general rule, the value of circumstantial evidence lies in its cumulative effect, that is, while a single item may only slightly increase the likelihood that the accused is guilty, several items taken together may carry enough probative force to justify a conviction.

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¹ Annsaei, Sunan, Hadith no. 3469.

² (1935) A.C. 462

³ (1947) 2 ALL E. R. 373

⁴ (1992 – 93) H.C.B. 54.

⁵ Muslim, Swahih Muslim, Hadith no. 1691, 1692, 1693, 1694.

⁶ Roberts, P., & Zuckerman, A. (2004). Criminal evidence, 1st Edition, p. 183

⁷ Anuwarullah. (2004). Principles of evidence in Islam, pg 111.

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