

**DNA EVIDENCE IN *ZINA* CASES: AN ANALYSIS TO ITS APPLICATION  
AND ADMISSIBILITY IN ISLAMIC LAW AND *SYARI'AH* COURT**

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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## **SUPERVISION**

### **DNA EVIDENCE IN *ZINA* CASES: AN ANALYSIS ON ITS APPLICATION AND ADMISSIBILITY IN ISLAMIC LAW AND *SYARI'AH* COURT**

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## DECLARATION

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I hereby declare that the work in this academic exercise is my own except the quotation and summaries which have been duly acknowledged

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## ABSTRACT

### **DNA EVIDENCE IN ZINA CASES: AN ANALYSIS TO ITS APPLICATION AND ADMISSIBILITY IN ISLAMIC LAW AND SYAR'AH COURT**

With the advancement of technology in this 21<sup>st</sup> Century, the forensic science has developed greatly. It has been used as tools for convicting the culprit. Interestingly, a number of scholars and human right activist in some Islamic Jurisdictions across the Muslim world have advocated for the adoption of the DNA evidence as valid proof for crimes in Islam. It is singled out for *zina*. They on opinion that the recognition and actual consideration of DNA evidence as a valid legal proof of *zina* will reduce the evidential burden required in the procedural aspects of the proceedings and it will facilitate the administration of justice. This research aims to identify on the issue of DNA as evidence in *zina* cases. Therefore, the main question here is that to what extent DNA evidence can be used in Islamic Law and admissible in the Syari'ah Court. Can DNA substitutes the legal proof of *zina* as explicitly (qat'i) stated in the Qur'an? Qur'an is indeed timeless and not subject to changes in any circumstances. Therefore, an analysis to its application will be discussed in this paper, with an appraisal of its advantages and limitations. The research will also further dilates on the opinions of the Muslim Contemporary scholars on DNA evidence as legal proof in *zina* cases. Furthermore, in this research, decided cases will be referred in regards to its admissibility (DNA evidence) in *Syar'iah* Court.

## TABLE OF CONTENTS

<b>SUPERVISION</b>	iii
<b>DECLARATION</b>	iv
<b>COPYRIGHT</b>	v
<b>ACKNOWLEDGMENT</b>	vi
<b>ABSTRACT</b>	vii
<b>CONTENT</b>	vii
<b>LIST OF CASE</b>	xi
<b>ABBREVIATION</b>	xii
Introduction	1
 <b>CHAPTER 1: DNA EVIDENCE IN LEGAL PERSPECTIVES</b>	
What is DNA in Real Realm	4
The foundation of DNA: A Historical	5
The Strength of DNA Evidence	6
The Limitation of DNA Evidence <sup>7</sup>	
DNA evidence: An Overview to its strength and limitations	12
 <b>CHAPTER 2: ZINA IN ISLAMIC CRIMINAL LAW</b>	
What is <i>zina</i> ?	14
The Prohibition of <i>Zina</i> in the Holy Quran	15
The Wisdom in the Prohibition of <i>Zina</i>	16

The Punishment of <i>zina</i> in the Holy Quran	17
The Legal Proof of <i>zina</i> as stated in the Holy Quran	18
<b>CHAPTER 3: DNA EVIDENCE IN <i>ZINA</i> CASE: DIRECT OR CIRCUMSTANTIAL EVIDENCE</b>	
DNA evidence in <i>zina</i> cases: Direct or Circumstantial Evidence	23
<b>CHAPTER 4: LEGAL RULINGS OF DNA EVIDENCE IN ISLAMIC LAW: AN ANALYSIS TO CONTEMPORARY SCHOLAR</b>	
Contemporary Muslim scholar's view	26
Failure to fulfill the requirements to proof <i>zina</i> , <i>hudud</i> is reduced to <i>ta'zir</i>	29
<b>CHAPTER 5: DNA EVIDENCE IN ISLAMIC POINT OF VIEW</b>	
DNA Evidence in Islamic Point of View	31
DNA: Evidence by Expert	34
The legal rulings of Expert Evidence in the Syari'ah Court Evidence Order, 2001 (Brunei Darussalam)	35
<i>Qiyafah</i> (Evidence to establish Paternity)	37
<b>CHAPTER 6: SYARI'AH COURT APPROACH ON DNA EVIDENCE IN PROVING <i>ZINA</i> CASE</b>	
Syari'ah Court in Brunei Darussalam	39
Syari'ah Court in Malaysia	43
Syari'ah Court in Pakistan	48
Findings	50

On what basis DNA evidence is accepted?	51
Why DNA evidence is rejected?	52
Conclusions	54
Bibliography	56
APPENDIX A	57
APPENDIX B	59
APPENDIX C	64
APPENDIX D	65

## LIST OF CASES

### **CRIMINAL CASE**

Hanafi bin Mat Hassan v. Public Prosecutor [2006] 4 MLJ 134	7
People v. Simpson [1995] WL 479507	9
Public Prosecutor v. Loo Seng Yip [2004] 8 CLJ 496	11
Public Prosecutor v. Richard Chia Kok Hiong [2007] 3 MLJ 129	8
R v. Adam [997] 1 Cr App R 368	6
R v. Sado (1975) 61 Cr App R 131	10

### **SYARI'AH CASE**

Pendakwa Syarie Negeri Sabah v. Rosli bin Abdul Japar [2007] 1 CLJ 496	41
Pendakwa Syar'ie v. Pg Metussin Bin Pg Hashim MTS/JEN/12/2007, Kes Semakan Mahkamah Rayuan: MRS/SJ/1/2008	37



**ABBREVIATION**

AIC	Australian Institute of Criminology
Chap.	Chapter
CID	Criminal Investigation Department
CLJ	Malaysian Syari'ah Law Journal
Co.	Company
DNA	Deoxyribonucleic Acid
ed.	Edition
Hm	His Majesty
Ibid	ion beam induced deposition
JEN	Jenayah
JH	Jurnal Hukum
MLJ	Malayan Law Journal
MTS	Mahkamah Tinggi Syari'ah
No.	Number
P	Page
pp.	Pages
PC	Penal Code
UNISSA	Sultan Sharif Ali Islamic University
US	United States
Vol.	Volume
...etc.	Et cetera

## INTRODUCTION

Any legal system seeks to fulfill only one purpose, and that is to ensure that justice is served, as in the legal maxim “*Justice must be done as ought to be done*”. It has been nevertheless been the fundamental doctrine of every Criminal justice system to protect the innocent and to ensure that the truth is revealed in any matter before the court, thereby ensuring that justice is done.<sup>1</sup> For many years both law and science had a unique interaction between them in the administration of criminal justice. Science, in particular forensic science, has been the helpful hand during investigation in eliciting the truth. Recently, Deoxyribonucleic Acid (DNA) evidence has become the new species used for identification purposes. It has been regarded as unique identification evidence which is highly discriminatory to the accused because of its biological nature. Therefore, the discovery of the DNA patterns has great influenced to the Western Jurisprudence particularly in the areas of Law of Evidence and Criminal Justice System. Both the substantive law and the Procedural law of evidence have been reformed to streamline the evidential requirements in line with the technological advancement.

For example, in Malaysia, Deoxyribonucleic Acid (DNA) identification Act 2009 was introduced. The primary objective of the databank is to keep and maintain seven indices of DNA profiles which consist of crime scene index, suspected persons index, convicted offenders index. These indices will be used for the purpose of human identification in relations to forensic investigation.<sup>2</sup> Other Countries also have their own legislation on DNA. This includes, DNA Identification Act 2008 of Canada, New South Wales Forensic Procedures Act 2000 and DNA Analysis Backlog Elimination Act of 2000 popularly called as the “DNA Act”. The Principal objective of the DNA Act was to “address the significant backlog of unanalyzed DNA samples within the states’ DNA database programs.

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<sup>1</sup> Mohd Munzil Bin Muhamad (2010), “Reliability and Conclusiveness of DNA Evidence in Criminal Trial”, *Malayan Law Journal* v.6, p. 1

<sup>2</sup> Mohd. Munzil Bin Muhamad (2010), “Deoxyribonucleic Acid (DNA) Identification Act 2009: An Overview”, *Malayan Law Journal* Articles v.6, p. 2

The advancement of forensic science especially DNA had leads a number of scholars and human rights activist in some Islamic Jurisdictions across the Muslim World have advocated for the adoption of the DNA evidence as valid proof for crimes in Islam. This juridical reasoning has been specially singled out for cases of *zina* (adultery or fornication). Some of human rights activist contend that the recognition and actual consideration of DNA evidence as a valid legal proof for *zina* will reduce the evidential burden required in the procedural aspects of the proceedings, and it will facilitate the administration of justice.<sup>3</sup> Indeed, the evidential burden will become lighter.

Nonetheless, the use of DNA has without a doubt been a tremendous tool in the investigation of crimes in this century. However, as the technology has advanced to enable DNA profiles to be gained from increasingly smaller amounts of materials, the risks of contamination and cross-transfer have risen. This is the main issue that needs to be taken into account if DNA is to be used for evidence in *zina*. Nevertheless, it is unfair to see DNA on its limitation only and neglecting its effectiveness in the criminal proceedings. The right question that should be asked about DNA is that how reliable and conclusive it can be? A further discussion at this point will be discussed in this research.

Therefore, the research is first to consider DNA as a means of evidence in the western jurisprudence by giving reason or grounds for its acceptance as evidence and the discussion on its advantages and limitations will be explained with reference to decided cases. The research will further discuss on the offence *hadd* of *zina* in Islamic Criminal law, the legal proof of *zina* as mentioned in the Primary sources of Islamic law; Al-Qur'an and *Sunnah* of Prophet Muhammad s.a.w. The research further dilates on the opinions of Muslim contemporary scholars on the relevancy and admissibility of DNA as legal proof of *zina* cases.

The main focal point on this discussion is on the acceptance of DNA evidence in the Islamic law and the approach of the *Syariah* Court in deciding the case, where the prosecution brings DNA as evidence in proving the *zina* cases. For this purpose, decided cases from

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<sup>3</sup> KARAMAH: Muslim Women Lawyers for Human Rights, "*Zina, Rape and Islamic Law: An Islamic Legal Analysis of the Rape Laws in Pakistan*", A Position Paper, [http://www.karamah.org/docs/zina\\_article\\_Final](http://www.karamah.org/docs/zina_article_Final) (Accessed 1 September 2011)

Malaysia and Pakistan will be referred and in Trial case of 2011, which is the first case in Brunei Darussalam, especially during the Syari'ah Court of Appeal also will be discussed in this paper. Furthermore, before DNA evidence can be accepted as evidence in *zina* cases, it is important to consider first at the first hand the kinds of punishment in Islamic Criminal Law, the prescribed punishment (*hudud*) and Discretionary punishment (*Ta'zir*). *Zina* is punishable under *hudud* as explicitly stated in the Qur'an and Sunnah. However, it also can be punished under *Ta'zir* if it fails to fulfill all the requirements in proving the crimes as stated in the Qur'an; four witnesses and confessions. The discussion at this point is indeed very important in order to get a better understanding on its rulings and admissibility in Islamic Law. Last but not least, to get a well-reasoned conclusion, an attempt is made to consider between DNA evidence and the principles of Islamic Jurisprudence in relation to *zina* cases.

## **CHAPTER 1: DNA EVIDENCE IN LEGAL PERSPECTIVES**

For many years both law and science had a unique interaction between each other in the administration of Criminal justice. Science, in particular forensic science, has been the helpful hand during investigations in eliciting the truth. In modern society, solving a crime can be said equal to finding a needle in a haystack. Criminal offenders have become very cunning and always find a way to escape being apprehended by the law. To mitigate this, forensic science has introduced finger print evidence, shoe evidence or glass evidence as methods of identification. Recently, Deoxyribonucleic Acid (DNA) evidence has become the new species used for identification purposes. Thus, this new foundation has become a very essential means in proving the crimes. The brief discussion to DNA evidence in regards to its purpose, function, advantages and limitations will throws some light into the basis of the whole discussion in this paper.

### **1.0 What is DNA in Real Realm**

In its simplest term, DNA is an acronym for Deoxyribonucleic Acid which is a substance that carries organism's genetic information. Technically, DNA is the basic building block of life and that it contains all the information that living things need to function correctly. It is material that governs inheritance of eye colour, hair colour, stature, bones density and many other human and animals traits. DNA is often referred to as our genetic blueprint because it stores information that is responsible for the genetic propagation of most inherited traits.<sup>4</sup> The unique of DNA is that it remains unchanged throughout life and can remain long after death. Furthermore, we inherit half our DNA from our mother and half from our father, with siblings (sisters and brothers) inheriting different combinations of the DNA sequence from the same parents. DNA profiles of siblings will have similarities; however their individual profiles will be different.<sup>5</sup>

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<sup>4</sup> Dr. Kasinathan Nadesan (2006), "Forensic Medicine and Science for Malaysian Lawyers", *Malayan Law Journal* Kuala Lumpur, p. 289

<sup>5</sup> Deborah Beaufort-Moore (2009), "*Crime Scene Management and Evidence Recovery*", New York: Oxford University Press, p. 109

## 1.1 The Foundation of DNA Evidence: A Historical

In 1984, research and insights by Dr. Alec Jeffreys at the University of Leicester, United Kingdom, led to the development of a procedure initially known as DNA fingerprinting. Its impact on forensic science cannot be overstated. Its application to criminal cases was rapid and, through some famous cases, was soon brought into the public eye. In the late 1980s, law enforcement agencies like the Federal Bureau of Investigation (FBI) and a number of commercial laboratories started performing DNA analysis.<sup>6</sup> The analysis is described below as contained in Encyclopedia Britannica:

In DNA analysis for a criminal investigation, using highly sophisticated scientific equipment, first a DNA molecule from the suspect is disassembled, and selected segments are isolated and measured. Then the suspect's DNA profile is compared with one derived from a sample of physical evidence to see whether the two match. If a conclusive non-match occurs, the suspect may be eliminated from consideration. If a match occurs, a statistical analysis is performed to determine the probability that the sample of physical evidence came from another person with the same DNA profile as the suspects. Juries use this statistical result in determining whether a suspect is guilty or innocent.<sup>7</sup>

This is the process through which the sample retrieved from the crime scene or from the body of the victim is analysed to reveal any match with the DNA of suspect. Therefore, it is said that DNA convicts as well as exonerates accused persons.<sup>8</sup> It has been established that the DNA evidence has solved many cases in Criminal Proceedings. DNA evidence also has been used in other issues like establishing paternity and other family relationships, identifying crime and

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<sup>6</sup> Kenneth W. Nimmich (1992), "*Structure of the FBI Laboratory*", in Julia Vernon and Ben Selinger (eds), DNA and Criminal Justice: Proceeding of a conference held 30-31 October 1989, Canberra: Australia Institute of Criminology, AIC Conference Proceedings; no. 2, 85-88

<sup>7</sup> "DNA". Encyclopedia Britannica. Encyclopedia Britannica 2009 Student and Home Edition. Chicago: Encyclopedia Britannica, 2009.

<sup>8</sup> Ben Selinger and Eric Magnusson (1992), "*The Scientific Basis of DNA Technology*", in Julia Vernon and Ben Selinger (eds), DNA and Criminal Justice: Proceeding of a conference held 30-31 October 1989. Canberra: Australian Institute of Criminology), 9

catastrophe victims, identifying endangered species as an aid to wildlife officials, identifying potential suspects whose DNA may match evidence left at crime scenes, detecting bacteria and other organisms that may pollute air, water, soil, and food, matching organ donors with recipients in transplant programmed, and determine pedigree for seed or livestock breeds<sup>9</sup>.

## **1.2 The strength of DNA Evidence**

The scientific breakthrough experienced in the 19<sup>th</sup> century and 20<sup>th</sup> century led to the discovery of the DNA as a linking factor of the relationship between two people convincingly established by the pattern involved. The application of DNA technology has without a doubt had a huge impact on the investigation of crime. Thus, the DNA evidence is widely applicable and used because of the following reasons:<sup>10</sup>

1. Within the DNA of an individual there are detectable patterns that are repeated a number of times that characteristics of her or him;
2. DNA, being a relatively robust molecule, survives well under a wider range (but not all) of environment conditions; if it was labile, its use would be limited. DNA is naturally broken down as the cells in biological samples age, but if the conditions are appropriate, such as following rapid desiccation or freezing, DNA can survive for centuries.
3. DNA can be isolated from any of a wide variety of biological samples likely to be left at a crime scene or incident;
4. The source of the DNA (blood, sputum, semen, etc.) does not matter and will usually produce the same pattern for any one individual. Exceptions to this are known but are rare.

Having reviewed the strength of DNA evidence, indeed, DNA evidence is unique and versatile. DNA has played a major role in modern criminal justice system by exonerating the

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<sup>9</sup> Ibid

<sup>10</sup> Andrew R.W Jackson and Julie M. Jackson (2006), *Forensic Science*, 2<sup>nd</sup> Edition), United Kingdom: Pearson Prentice Hall, p. 130

“innocent” and convicting the “culprit”. In fact, the courts in most countries across the world accept DNA evidence as gospel truth without the need for further corroboration.<sup>11</sup>

### 1.3 The Limitation of DNA Evidence

The Technological advances have enabled DNA profiles to be obtained from increasingly small samples. However, as the sensitivity of the techniques improves, so do the risks of transfer and contamination. Nevertheless, many conceptions has been occurs as to the applicability of DNA evidence. Some perceive it as cogent and conclusive evidence. Although, DNA evidence is regarded as highly discriminatory, its conclusiveness and reliability very much depended on other preceding issues beginning from the time it was obtained at the crime scene until the time it was presented in court. These prequel issues have made DNA evidence lack independence and made it prone to challenges. In fact it has been observed:

“Although DNA evidence is highly regarded as a key to solving cases, it should not ne accepted as an infallible safeguard in protecting individuals. In most criminal cases, DNA evidence is not even left at the scene. According to *The Washington Times*, fewer than ten percent of the homicide cases in the Baltimore State’s Attorney’s Office involve fingerprint or DNA evidence. This means that verdicts must be based on other evidence, such as confessions, murder weapons and other forensic evidence.<sup>12</sup>

Prior to the case of *R v. Adams*, many criticized the weight given to the conclusiveness of DNA tests which was commonly referred to as ‘the prosecutor’s fallacy’.<sup>13</sup> The test used to be that if the accused had a DNA profile which matched the crime stain and let us say, there is a million to one probability that the accused left the crime stain, he was guilty of the crime.

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<sup>11</sup> Nicola Leaney (1992), “*What is involved in Producing Sound DNA Evidence?*”, in Julia Vernon and Ben Selinger (edns), *DNA and Criminal Justice: proceedings of a conference held 30-31 October, Canberra: Australia Institute of Criminology, AIC Conference Proceedings; no. 2, 14 – 17.*

<sup>12</sup> N.R. Behrouzfar (2006), “*Strengths, Limitations and Controversies of DNA Evidence*”, *Trends and Issues in Scientific Evidence*, Vol. 1, p. 128

<sup>13</sup> [1997] 1 Cr App R 369 at p. 373



The correct approach is that the significance of DNA evidence will depend very much upon what else is known about the suspect. In other words, the mere existence of DNA evidence alone cannot link the accused to the crime. It was not sufficient to prove beyond a reasonable doubt that the accused had committed the offence. This approach has been upheld by Malaysian Court in the case of *Hanafi bin Mat Hassan v. Public Prosecutor*.<sup>14</sup> According to Andrei Semikhodskii:

This issue involves both legal theory and practices. One should ask himself whether DNA evidence on its own is sufficient to prove the elements of *actus reus* and *mens rea* on the crime in question. Absence of either element will not dispose the burden that the accused has committed the offence. For instance, semen matching the DNA profile of the accused found in the victim's vagina does not automatically indicate that the victim has been raped. Lack of consent on the sexual intercourse which has taken place must be proved by adducing other evidence or testimony<sup>15</sup>.

Without hesitation, the newly developed scientific evidence like DNA evidence could be a strong tool for the Criminal Justice System. However, the nature of the DNA evidence itself requires scrutiny since it involves many stages starting from the investigation stage, the laboratory stage and finally when the end result is adduced before the court.

Thus, the challenges towards the admissibility of DNA evidence in court may come from many stages in the investigation processes, laboratory processes up until the DNA evidence is presented before the court. Although, some people perceived DNA evidence as unassailable proof of guilt, nevertheless, it is subject to challenges like any other scientific analysis because of its nature<sup>16</sup>. Despite the notion that scientific evidence never tells lies, we cannot brush aside any possibility of inaccuracy from results obtained since scientific evidence like DNA is dependable upon many extrinsic factors.

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<sup>14</sup> [2006] 4 MLJ 134 p. 175

<sup>15</sup> Semikhodskii A (2007), *Dealing with DNA Evidence a Legal Guide*, Routledge-Cavendish, New York, p. 137

<sup>16</sup> Semikhodskii A, *Dealing with DNA Evidence a Legal Guide*, p. 149

### **1.3.1 Contamination during investigation stage.**

The process of developing DNA evidence is actually commenced from the place where the alleged crime was committed. It is from the crime scene that samples such as blood stain, seminal stain, finger clipping, hair strand and other are collected for testing. As such, it must be noted that management of the crime scene is also of the utmost important before a concrete DNA analysis can be obtained. The main argument is that, failure to observe procedures while collecting samples at the crime scene may cause the DNA result to be inaccurate. Failure to observe procedures may occur due to several reasons. First of all, it may be due to lack of knowledge and training among the Police force or those who are involved directly with the crime scene. Secondly, it may be also due to the lack of experience of the person who has been given the task of collecting the samples.<sup>17</sup>

There has been an instance where the Court rejected the reliability of DNA evidence due to failure to observe proper procedure during investigation. The case was *Public Prosecutor v. Richard Chia Kok Hiong*, a case decided by High Court of Brunei Darussalam.<sup>18</sup> Steven Chong J in that case disregarded DNA evidence after he lamented on how the Police officers involved in the investigation of the case had little appreciation of the risks of contamination and had disregarded the procedure in the collection, handling and storage from the crime scene were placed in envelopes which were not sealed and put in boxes. In addition, there were no records whatsoever as to the movement of exhibits in the store, thus, questioning the chain of the evidence before they were handed to the lab for testing.

### **1.3.2 Contamination while conducting the DNA test**

We need to be mindful that there are many oblivious sources of contamination and these can occur even while the scientific analysis is conducted. This is due to the fact that laboratory test of DNA involves a complex and lengthy process which includes participation of many people and

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<sup>17</sup> Muhammad Munzil [2010], *Reliability and conclusiveness of DNA evidence in Criminal Trial*, p. 4

<sup>18</sup> [2007] 3 MLJ 129 p. 166

various techniques. A slight mistakes or human error at any stages can invalidate the results and reduce the probative value of DNA evidence. In *People v. Simpson*, one of the forensic scientist admitted that he accidentally spilled the referral blood sample of the accused at the evidence processing room and afterward handled with other collected samples at the crime scene. The defence has used this reason to suggest that Simpson's blood was inadvertently transferred which explains why the DNA profile was consistent with the accused.<sup>19</sup>

Furthermore, the Court in Richard Chia's case also rejected the DNA evidence based on the fact that the court did not have full confidence in the prosecution's stand that contamination could have happened when the test was conducted in the Singapore laboratory. Based on the explanation given by the defence expert, the court could not rule out the fact that the laboratory findings may have been compromised.

### **1.3.3 Existence of mixed DNA profile or partial profile**

Sometimes there are instances where the developed DNA profile produces results high contain DNA of more than one person. This can occur when more than one person leaves a DNA trace at the crime scene. It can also occur when the alleged crime involved the participation from more than one person leading to what is called a "mixed DNA profile." However, there is also an instance where the full DNA profile could not be developed even though there is one contributor for the sample tested. This situation is called a "Partial profile". A mixed DNA profile could be triggered by many factors. Contamination or degradation of samples tested can also be the reasons for this undesirable result.<sup>20</sup>

These two situations have been commonly considered to be 'divine blessing' for the defence in proving their client's innocence. This is due to the fact that the evidence of such nature carries an element of doubt in itself. It is the basic principle of law that when there are two inferences could be made from the same facts, an inference which is in favour of innocent should be

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<sup>19</sup> Semikhodskii A, *Dealing with DNA evidence a Legal Guide* at p. 150: No BA097211 Cal Super CT [1995] WL 479507

<sup>20</sup> Muhammad Munzil [2010], *Reliability and Conclusiveness of DNA evidence in Criminal Trial*, p. 6-7

applied. This is also concomitant with the maxim of equity which propounded that “it is better to let the guilt loose rather than convicting one innocent man”.

#### **1.3.4 Different Opinion between Experts**

The most unique concept in adversarial system is that all the parties to the trial have the opportunity to bring their own witnesses to support their arguments. When the prosecution is calling their expert in adducing DNA evidence, the same right goes to the defence to call their own expert in disputing the former. The Court then has the duty of determining which of the evidence had greater weight.<sup>21</sup>

The legal principle on this has been prescribed clearly in the case of *R v. Sado*. In that case, Widgery LCJ explained that when the court is faced with this situation, it can choose and accept the opinion of one expert and reject that of another upon consideration of the evidence as a whole.<sup>22</sup> However, when the Court in *Richard Chia* found a divergence in the views reflected by the complexity of the case which was not due to any personal preferential biasness it looked back into whether there were any doubts in the circumstances on those issues and gave the benefit of the doubt in the accused’s favour.

#### **1.3.5. Failure to explain the details of DNA evidence**

An expert who testifies in Court for DNA evidence needs to explain the detail of his analysis thoroughly. It is incumbent for the expert to explain in detail not only the procedures as how the DNA test was conducted but he must also give reasons on how he arrived at the conclusion. As such, an expert cannot simply read the result of his analysis without explaining it.

An expert witness is not a witness who testifies on questions of fact. Therefore, an expert needs to explain the ground of his decision as required. Several cases have shown that this issue has been raised by the defence in challenging the admissibility of DNA evidence. In fact, the court is agreeable with that contention. In *Hanafi’s* case, the Court ruled that when testifying,

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<sup>21</sup> Muhammad Munzil [2010], *Reliability and Conclusiveness of DNA Evidence in Criminal Trials*, 4

<sup>22</sup> (1975) 61 Cr App R 131 p. 133-134

DNA expert must explain in detail on how he obtained the matching DNA characteristic. In other words, he has to explain all the details as to how the results tabulated in the report were obtained. Apart from that, the DNA expert is also required to explain to explain on how he managed to get the random match probability including the method of calculation used by him.<sup>23</sup>

Thus, failure to satisfy on the above requirements would cause the DNA evidence to have no evidential value. In *Public Prosecutor v. Loo Seng Yip*, the DNA expert merely stated that the DNA profile from the blood sample belonged to the accused because it matched with the blood found on the crime scene. He also merely stated that the random occurrence ratio indicated the probability of a randomly selected unrelated individual having the matching DNA profile is approximately one in four billion as calculated based on the Malaysian Chinese Population. There were no reasons given by the Chemist before he arrived at the conclusion of his findings. He neither explained the nature of DNA characteristics and the number of matches that were similar nor as to how he arrived at the random occurrence ratio.

As such, the chemist had only given the evidence of the conclusion without adverting to the reasons that led to such a conclusion. The fact that the required evidence was on the report made no difference to his evidence because the report itself was only considered as a piece of corroborative evidence and could not supplement or substitute the oral evidence that should have been given at the first instance by the expert. It also settled law that corroborative evidence is not meant to validate the evidence which is deficient or suspect or incredible but only to confirm and support the evidence as satisfactory. Therefore, evidence tendered to corroborate the testimony of a witness cannot be used as substitute of substantive evidence itself.<sup>24</sup>

#### **1.4 DNA Evidence: An overview to its strength and limitations**

Apparently, the emergence of DNA in this century had given a tremendous effect to the World Legal System, especially in the Criminal Proceedings and Law of Evidence. The DNA evidence has solved many cases that have not been proven for many years. In Western Jurisprudence,

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<sup>23</sup> [2006] 4 MLJ 134 p.171

<sup>24</sup> [2004] 8 CLJ 496 p. 506

DNA evidence had accepted positively and widely due to its unique and versatility in solving the case.

To some extent, DNA also faced some limitations. DNA evidence is not perfect evidence in proving the crimes as being wrongly promoted by some DNA fundamentalist. By nature of the evidence itself, DNA evidence could never be regarded as conclusive evidence although it may become strong corroborative evidence that will operate as part of identification evidence similar to fingerprint evidence. The basic principle for corroborative evidence is that it must be independent so that it excludes any element of bias or discrimination that will affect the reliability of such evidence.<sup>25</sup>

Although DNA can be regarded as crucial evidence in this era but it cannot be regarded as conclusive evidence as such evidence is exposed with doubt, human mistake and procedural error. Therefore, the DNA evidence can only be admissible in Court if it is proven to be with high degree of percentage and the test is conducted with reliable manner.

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<sup>25</sup> Muhammad Munzil [2010], *Reliability and Conclusiveness of DNA evidence in Criminal Trial*, p. 11

## CHAPTER II

### *ZINA* IN ISLAMIC CRIMINAL LAW

Islam is a complete code of life and it guides its believer in every temporal and spiritual matter. Its norm and precepts are universal and are fit for every time and place. The concept of justice in Islam is all pervading and has to be manifested in every sphere of human life. Like other systems, Islam has stressed on justice in judicial system. The most important scheme of things in Islam is that everyone is bound not to violate the rights of others and to convey to them their due, and the state has to protect and preserve the life, liberty, property and honour of its citizens. For the achievements of these goals, Islam has enacted some laws and has laid down certain principles for the enactments of further laws which bear varying interpretations and applications according to the circumstances of the time. The law pertaining to *zina* is explicitly stated in the Qur'an and the *Sunnah* of Prophet Muhammad (s.a.w). Therefore, here is the study on the *hadd* of *zina* in Islamic Law.

#### **2.0 What is *Zina*?**

The word “*zina*” is a generic word that encompasses both adultery and fornication. “*Zina*” means willful sexual intercourse between a man and woman who are not, and do not suspect to be, validly married to each others. The Jurists usually define it as sexual intercourse between a man and a woman who are not, and do not suspect to be, in a state of legal matrimony.<sup>26</sup>

Therefore, *zina* is an illicit sensual gratification with an opposite sex in the absence of a valid legal solemnization of such a relationship.<sup>27</sup> It is prohibited in Islamic law as clearly mentioned in the Holy Qur'an and Sunnah.

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<sup>26</sup>Anwarullah (2006), *The Criminal Law in Islam*, New Delhi: Kitab Bhavan p. 124

<sup>27</sup> Kamal bin Sayyid Salim (2003), *Sahih fiqh al-Sunnah wa-adillatihi wa-tawdih madhahib al-a'immah*, Vol. 4, Cairo: al-Maktabah al-Tawfiqiyah, p. 21

## 2.1 The Prohibition of *Zina* in the Holy Quran

The prohibition of *Zina* is explicitly stipulated and stated in many verse of the Holy Qur'an. Thus, the punishment of *zina* is falls under *Hudud* category, whereby the Punishments is fixed in the Holy Qur'an and Sunnah of the Prophet (P.B.U.H). Here are some verses in the Holy Qur'an which prescribes the prohibition of *Zina*.<sup>28</sup>

﴿ وَلَا تَقْرَبُوا الزَّانِيَ إِنَّهُ كَانَ فَحِشَةً وَسَاءَ سَبِيلًا ﴾

Means: “And do not come to *zina*: For it is a shameful (deed) and an evil, opening the road (to other evils)”.

Islam is very concern of the crime of *zina* and therefore, strictly prohibited the offence as this leads to many social problems. Further, Islam also prohibits any action which has very close avenues of approach to *zina* and prohibited every step and every means leading to it. Consequently, *Khalwat* (proximity) is prohibited in Islam as such act may give opportunity for sexual intimacy.

The Qur'an had described the qualities of the believers. It states as follows:<sup>29</sup>

﴿ وَالَّذِينَ لَا يَدْعُونَ مَعَ اللَّهِ إِلَهًا آخَرَ وَلَا يَقْتُلُونَ النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَلَا يَزْنُونَ وَمَنْ يَفْعَلْ ذَلِكَ يَلْقَ أَثَمًا ﴾

Means: Those who invoke not with God any other god, nor slay such life as God has made sacred, except for just cause, nor commit fornication, and any that does this meets punishments.

The Qur'an further states that:<sup>30</sup>

<sup>28</sup> Al-Israa: 32

<sup>29</sup> Al-Furqan: 68

<sup>30</sup> Al-Jumu'ah: 12



يَأْتِيهَا النَّبِيُّ إِذَا جَاءَكَ الْمُؤْمِنَاتُ يُبَايِعُنَكَ عَلَىٰ أَنْ لَا يُشْرِكْنَ بِاللَّهِ شَيْئًا وَلَا يَسْرِقْنَ وَلَا يَزْنِينَ وَلَا يَقْتُلْنَ أَوْلَادَهُنَّ وَلَا يَأْتِينَ بِبُهْتَانٍ يَفْتَرِينَهُ بَيْنَ أَيْدِيهِنَّ وَأَرْجُلِهِنَّ وَلَا يَعَصِينَكَ فِي مَعْرُوفٍ فَبَايِعْنَهُنَّ وَأَسْتَغْفِرْ لَهُنَّ اللَّهُ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ

Means: “O Prophet! When believing women come to you to take the oath of fealty to you, that they will no associate in worship any other thing whatever with God, that they will not steal, that they will not commit adultery (or fornication) that they will not kill their children, that they will not utter slander, intentionally forging falsehood and that they will not disobey you in any just matter- then do you receive their fealty”.

## 2.2 The wisdom behind the Prohibition of *zina*

The wisdom for the prohibition of *zina* is very clear. By referring to the *maqasid of al-shariah*, Islam is aiming to secure and protect the mankind in this world and hereafter, and prevent them from doing evil. Therefore, the prohibition of *zina* is generally for the protection of lineage and dignity as one of the main purpose of *maqasid al-shariah*. The offence of *zina*, indeed leads to many negative effects. Thus, the outcomes may be deduced as follows; *zina* may leads to confusion of lineage, child abuse, the breaking up of families, and bitterness in relationships, the spread of venereal disease and a general laxity in morals<sup>31</sup>. By referring to the comment of ‘Abdullah Yusuf ‘Ali in regards to the wisdom in the prohibition of *zina*, he stated that:<sup>32</sup>

“Adultery is not only shameful in itself and inconsistent with any self-respect or respect for others, but it opens the road to many evils. It may destroy the basis of the family; it works against the interest of children born or to be born; it may cause murders and feuds and loss of reputation and property and also loosen permanently the bonds of society. Not only it be avoided as a sin but any approach or temptation should be avoided.”

<sup>31</sup>Anwarullah (2006), *The Criminal Law in Islam*, p. 125

<sup>32</sup> Yusuf ‘Ali, Commentary, p. 703

### 2.3. The Punishment of *zina* in the Holy Qur'an

As mentioned earlier, *zina* is punishable under *hudud*. The punishment is fixed in the Holy Qur'an and *Sunnah* Prophet S.A.W. Therefore, it cannot be changed nor altered. The Punishments of *zina* is classified into two types; *ghair al-muhsan* (unmarried person) and *muhsan* (married person).

#### 2.3.1. Punishment of *Ghair al-muhsan* (Unmarried person)

The first type of punishment is *ghair al-muhsan*. The punishment is a hundred lashes. Thus, the punishment is stated in the Holy Qur'an which states as follow:<sup>33</sup>

﴿الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيْشَهِدَ عِدَايَهُمَا طَآئِفَةٌ مِّنَ الْمُؤْمِنِينَ﴾

Means: “The woman and the man guilty of adultery or fornication flog each of them with hundred stripes. Let not compassion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day; And let a party of the believer witness their punishment”.

The Order of this verse is general for both married and unmarried persons who commit *zina*. But the *Sunnah* of the Prophet excluded the married persons from its ambit and this verse applies to unmarried person only who commits *zina*. Thus, there are many opinions of Muslims Jurist pertaining to the punishment of *zina* for *Muhsan* (Married person). According to Imam Abu Hanifah, the punishment is hundred stripes. Meanwhile, according to the Majority of Muslims Fiqh, Imam Maliki, Imam Shafi'I and Imam Hanbali, the punishments of *zina* for an unmarried person are hundred stripes and banishment for one year.<sup>34</sup>

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<sup>33</sup> An-Nuur: 2

<sup>34</sup> *Sunan Al-Tirmidhi* “Kitab al-Hudud”, Vol. 4 p. 32, *Sunan Abu Dawud*, Kitab al-Hudud” vol 4, p. 144, *Sunan Ibnu Majah*, “Kitab Al-Hudud” vol. 2, p. 852