

Evidence in *Zina* Cases as a Form of Discrimination against Women in Pakistan

Nqobizwe Mvelo Ngema

Law Department, University of Zululand, South Africa.

Corresponding author: NgemaNM@unizulu.ac.za

© Authour (s)

OIDA International Journal of Sustainable Development, Ontario International Development Agency, Canada.

ISSN 1923-6654 (print) ISSN 1923-6662 (online) www.oidajsd.com

Also available at <https://www.ssm.com/index.cfm/en/oida-intl-journal-sustainable-dev/>

Abstract: Islamic law regards fornication and adultery (*zina*) as a very serious offence and unlawful (*haram*) and attracts a severe punishment to any transgressor. *Zina* can be proven by confession of the culprit or by a testimony of at least four Muslim male witnesses. Women are not allowed to testify as witnesses in *zina* cases, and the findings of this paper is that the exclusion of women from testifying in *zina* cases constitutes an unfair discrimination against women and this is not in line with international human rights. The standard of proof is higher to women if compared to their male counterparts and this constitutes discrimination against women. This is because pregnancy of an unmarried woman is used as evidence of fornication (*zina*), and this led to a situation where a woman is convicted for committing *zina* while her accomplice is acquitted for lack of evidence. Biologically a man cannot be impregnated by anyone, and he can only be convicted of *zina* if he confessed or when there is testimony of four male witnesses. Common sense dictates that it is not easy if not impossible to get the testimony of four witnesses who saw actual penetration during sexual intercourse. The current evidentiary requirements in *zina* cases are a clear violation of human rights of women.

Keywords: fornication and adultery (*zina*), testimony in *zina* cases, pregnancy as proof of *zina*, discrimination against women

Introduction

Almost every revealed religion forbids fornication and adultery and regards it as an inexcusable sin. In today's fast paced world, morality is lost day by day (Yesmen and Nahid 2020,34). Islamic religion is one of the revealed religions of the world that tries everything humanly possible to avoid fornication and adultery (*zina*). Islamic law permits early marriage to avoid fornication, and it punishes any culprit of fornication and adultery. One of the reasons behind the penalty of *zina* is to prevent Muslim believers from committing sexual immorality. Every Muslim believer who commits a forbidden act of love making such as fornication or adultery is deemed as the one who has committed sexual sin (Yesmen and Nahid 2020,34). Furthermore, Islamic law regards family as a very important societal structure that deserves to be protected. Only married couples are allowed to form the family and legitimate sexual intercourse is only permissible amongst the parties who are legally married to each other. Muslims views fornication or adultery as a wicked behavior that discourages marriage and as conduct that has detrimental consequences such as the spread of diseases, divorce, family battles, jealousy, and birth of extra-marital children. So, the *hudud* offence of *zina* can be proved by three general means, namely: Confession from the person who committed *zina*, testimony of four reliable male eyewitnesses, and appearance of pregnancy in the unmarried woman. Only four male eyewitnesses are allowed to testify in *zina* cases while females are not allowed to testify. On the face of it, this constitutes a blatant discrimination against women.

Some Islamic schools of thought (*madhhab*) such as *Maliki* regards an appearance of pregnancy in the unmarried woman as proof of fornication (*zina*). This manifestation of pregnancy in an unmarried woman raises some thought-provoking questions of equality. This is so because biological differences between a man and a woman makes it impossible for a male person get pregnant and if he commits an offence of fornication or adultery (*zina*), the offence can be evidenced by his admission of guilt or the testament of four reputable males who observed with their naked eyes the actual penetration taking place. So, the standard of proof is higher to females if compared to their male counterparts and this may lead to a situation where a female fornicator is convicted while a man who fornicated with her is acquitted for lack of evidence. Common sense dictates that the acquisition of proof of *zina* from four reputable

male witnesses is an uphill one if not completely impossible because they must have observed actual male genital organ penetrating a female genital organ. It must be committed in a public place to such an extent that observers managed to observe sexual intercourse taking place without interfering with the privacy of the culprits. The aim of this paper is to investigate whether the testimony of four reliable male eyewitnesses constitutes discrimination against women or not. Moreover, it will further investigate whether the usage of an appearance of pregnancy in an unmarried woman as proof of *zina* constitutes discrimination against women or not.

A Historical Overview of the Punishment of *Zina* and its Evidential Requirements

The researchers will commence this section by making a brief historical background about criminal offences that are recognized in Islamic law and are grouped into three categories, namely: (a) *Hudud* – are crimes or desecration against Allah (God) and against public interest. As a result of this, they are regarded as the worst crimes a Muslim can commit (Korbatieh 2018, 15); fornication and adultery (*zina*) falls within this category of offences committed against God and against public interest; (b) *Qisas* (equality and retaliation) & *diyya* (pecuniary compensation) - *qisas* are crimes against people. They are usually crimes such as the negligent killing of another human being or assault; and (c) *Ta'azir* (optional penalties) - are crimes that are not explicitly mentioned in Islamic law sources but accommodates societal changes (Korbatieh 2018,15) and this gives discretion to the judge. Siddiqi is one of the researchers of Islamic law that holds a point of view that the punishment for fornication and adultery (*zina*) is very harsh and that there is justification for such a harsh penalty because Islam encourages early marriage to discourage fornication and permits polygyny to discourage adultery (Lieppman 1989). It is not an easy exercise to prove an Islamic *hudud* offence of fornication or adultery (*zina*). The guilty party is expected to admit his guilt by confessing out of his own free will and volition that he is the one who committed fornication or adultery (Kliff and Das 2008). The wrongdoer is expected to make his or her confession four consecutive times before the court of law (Lippman 1988). It is noticeable that the person who made a confession has a right to withdraw it before conviction is executed and such withdrawal means that penalty for committing *zina* will no longer be implemented by the presiding officer (Bassiouni 1982, 92). Culprits of *zina* are even encouraged to withdraw their confession.

Confession will only be used as admissible evidence if it was obtained in a proper manner that is free from duress or abuse but was given freely by the one who made a confession (Korbatieh, 2018). In view of the penalty that is reserved for anyone who will be found guilty of committing *zina*, it is not likely for any Muslim believer who is in his right senses to make such an admission of guilt. One hundred lashes on the buttocks are harsh enough to send shiver down the spine of anyone who is considering committing *zina*. This is also accompanied by the possibility of banishment for a duration of a year. This is so because some Islamic schools of thought combine the penalty of flogging with 100 lashes and with banishment for a duration of 12 months to anyone who is found guilty of fornication. It is even worse if a forbidden sexual intercourse is committed by the married person because the punishment for such wrongdoer is death by stoning (*rajm*). If there is no confession from either the female wrongdoer or male wrongdoer, it makes it difficult to make a conviction for *zina*. This is exacerbated by the fact that in the absence of the confession from the wrongdoer, the only available option of proving *zina* is through the testimony of four reputable male Muslim witnesses who saw penetration taking place (Peiffer 2005, 507).

The process of proving *zina* through a witness testimony of four male witnesses is not easy in practical circumstances. This is so because the offence must be committed in a public place to such an extent that the four witnesses who saw penetration managed to see the culprits without breaching their right to privacy (Korbatieh 2018, 19). No wonder one of the researchers of Islamic law came into a conclusion that the standard of proof in *zina* cases is so high to such an extent that it makes the punishment for *zina* to be appropriate for those individuals who don't care about public morality (Baderin 2011,28). Coulson finds an offence of *zina* as comparable to an offence public indecency that is commonly recognised by countries from the west (El Ewa 1982,08).

Proof of *zina* still remains a contentious issue amongst the academics who specialize in the sacred laws of Muslims. This is worsened by the fact that the most important Islamic schools of thought (*madhhab*) have not yet reached a common ground on what really constitute a valid confession or testimonial evidence. This has a possibility of creating both practical and legal problems when it comes to the application of Islamic law, namely:

- a. *Shafi*, *Hanbali* and *Hanafi* schools of thought expect a wrongdoer who want to admit his or her guilt to do so by articulating four times while *Maliki* school expect that even if the confession is articulated once it would suffice (Peiffer 2005,507).
- b. Widely held view of the *Maliki* school of thought is that, in addition to admission of guilt by the wrongdoer or testimony of four reputable witnesses, pregnancy of an unmarried woman can also be used as evidence to prove fornication (*zina*) if there is no evidence to the contrary. If it can be proven that a woman was

impregnated because of a rape incident, she cannot be charged with *zina*. On the other hand, other schools of thought are of the view that pregnancy cannot be used as an automatic proof of *zina*. Hence, other schools of thought only use the admission of guilt by the wrongdoer or the testimony of four reliable male witnesses (Korbatieh 2018, 19).

- c. *Hanbali* school of thought is of the view that if a married person commits adultery (*zina*), his or her punishment should be stoning to death combined with flogging. On the contrary, *Hanafi*, *Maliki* and *Shafei* schools of thought are completely against the combination of stoning to death and flogging.
- d. *Maliki* school is of the view that an appropriate punishment for any male Muslim believer who fornicates is flogging combined with banishment but against the banishment of females. On the contrary *Hanafi* school rejects the banishment of the wrongdoers because it is not clearly stipulated in the Quran but it is only traceable to one of the hadiths.

The latter mentioned differences within the schools of thought shows that the proof of *zina* and its punishment continues to be a contentious issue that is not free from practical and legal challenges of implementation.

Proof of Adultery and Fornication (*Zina*) as form of Discrimination against Women

The quest for an egalitarian society that is free from unfair discrimination appears from the reading of numerous international and regional human rights instruments. The right to non-discrimination is clearly protected in many human rights instruments such as the African Charter on Human and Peoples Rights (Article 1 (3), 13 (1) (b) and 55 (c)), the United Nations Charter (UN Charter, Article 15), the Universal Declaration of Human Rights (UDHR, Article 2 & 7), the International Covenant on Economic, Social and Cultural Rights (ICESCR, Articles 2 (1), (2) & 3), the International Covenant on Civil and Political Rights (ICCPR, Articles 2, 3 & 26), the Convention on the Rights of the Child (CRC, Article 2), the European Convention for the Protection of Human Rights (Article 14), the American Convention on Human Rights (Article 14). Pakistan has made the commitment to be bound by the latter mentioned international human rights instruments and it has done so by appending its signatures. The value of non-discrimination forbids both direct and indirect discrimination. Therefore, if the purpose or effect of discrimination is to impair equal enjoyment of rights is forbidden in terms of the latter mentioned human rights instruments. The United Nations is very serious about the protection of equality, and this appears from some of the international human rights instruments that explicitly address specific prohibited grounds of discrimination, such as the International Convention on the Elimination of all forms of Racial Discrimination, and the International Convention on the Elimination of all forms of Discrimination against Women (CEDAW). It can be rightfully argued that many members of the international community of states are speaking in one voice when they are saying inequalities and unfair discrimination ought to be eliminated.

Pregnancy as confession to *zina* in Pakistan

The reading of the provisions of section 8 of the *Zina* Ordinance shows that *zina* can be proved by the admission of guilt by the wrongdoer. If the wrongdoer confesses before a court of law that he or she has committed an offence of *zina*, the *hudud* punishment of *zina* follows if the one who made a confession never retracted his or her statement. On the contrary, if the wrongdoer withdraws his confession before the execution of the judgment, he or she may be acquitted or convicted under *tazir*. An accused may be convicted under *ta'zir* if there is no evidence from four reputable male witnesses who witnessed an act of penetration or when the accused has not admitted the commission of an offence through a confession. In simple terms, if the evidence does not meet the minimum requirements for the imposition of highest sentence, but if he or she is found guilty, he may be penalized with a slighter penalty known as *ta'zir*. Therefore, if evidence is not enough for an imposition of *hudud* penalty, this may still result to a conviction under *ta'zir*. Physical appearance of a woman is also used as evidence for the commission of an offence of *zina*. If pregnancy of a woman is visible for everyone to see, it could be used as evidence against her that she committed *zina* if she is not yet legally married to any man during the time of such pregnancy (Mst. Fehmida v State).

The great mistake that was once committed by the law makers of Pakistan was to use the same standard of proof for both fornication or adultery (*zina*) and rape. An offence of rape can be adduced by the testimony of the wrongdoer or the testimony of four reputable male witnesses. So, in the absence of admission of guilt and testimony of four male witnesses, a female person who filed a case for rape was regarded as the one who committed *zina*. This is the key reason that I instigated a call for the reforms of the *Hudood* Ordinance. This left the victims of rape in a very difficult position. This was so because if a complainant of rape wanted to lay charges of rape, she was expected to follow a harsh, difficult, and discriminatory standard of proof. This standard of proof required a complainant to produce the evidence of at least four male reputable witnesses or the confession of the accused within the meaning of section 8 of

the *Zina* Ordinance which provided that: “Proof of *zina bil-jabr* liable to had shall be in one of the following forms, namely:

(a) The accused makes before a court of competent jurisdiction a confession of the commission of the offence; or (b) At least four Muslim adult male witnesses, about who the court is satisfied, having regard to the requirements of *tazkiyah-al-shuhood*, that they are truthful persons and abstain from major sins (*kabair*), give evidence as eyewitnesses of the act of penetration necessary to the offence: Provided that, if the accused is a non-Muslim, the eyewitnesses may be non-Muslims. ... “*tazkiyan al-shuhood*” means the mode of inquiry adopted by a court to satisfy itself as to the credibility of a witness.”

Common sense dictates that it is not easy, if not impossible, to acquire the evidence of reputable witnesses that are up to four in number who observed with their naked eyes an act of penetration during sexual intercourse. Such intercourse must be committed in public to such an extent that the witnesses managed to watch them doing sexual intercourse and see the actual penetration without having to disturb the culprits in the process. This inability of the victim or the complainant of rape to meet the required standards of proof had the detrimental consequences for the victim of rape because the courts perceived her evidence as unsatisfactory if there is no testimony of four reputable male witnesses or the confession from the accused. The absence of the required proof was regarded as an automatic confession of *zina* on the part of the victim. This disastrous reality can be easily witnessed from some of the ground-breaking cases which were brought before the Pakistan courts (*Jehan Mina v State*; *Safia Bibi v State*). In essence, the court judgments contained conversion of rape complaints into *zina* convictions of complainants or victims who laid charges of rape but unable to provide four reliable adult male testimonies or the confession of the accused. In the case of *Jehan Mina v State*, there was an allegation of rape by a fifteen-year-old girl who instituted a legal action for rape against her cousin and uncle. According to the girl (victim of rape) she was raped by her uncle and her cousin and that resulted to her pregnancy. The court used her pregnancy condition as proof of *zina*. Hence, she was convicted and imprisoned while her rapists were set free for lack of evidence. This was a clear discrimination against women and obviously not in line with Pakistan’s human rights obligations. In the case of *Safia Bibi v State*, international human rights lawyers and journalists became attracted to this case, and it drawn their attention. This case involves a blind girl who was allegedly raped and became pregnant because of that rape incident. Her father decided to open a case of rape on her daughter’s behalf after she delivered her child. The court converted rape charge into a charge of *zina*. The victim of rape was sentenced to three years behind the bars, subjected to flogging for 15 times and ordered to pay a fine of one thousand Rupies. In the case of *Rani v State v State*, this is another conversion of a charge of rape to the charge of *zina*. *Rani* was allegedly raped and threatened by her rapists not to report the case. She was indeed threatened because she complied until it was impossible to hide her pregnancy. This is affirmed by the fact that she instituted a legal action of rape when her pregnancy was seven months old. The court acquitted both men (her alleged rapists) because of lack of evidence from four reliable male eyewitnesses. The court eventually found *Rani* guilty of *zina*. In the case of *Gul Hamida v State*, a lady was pregnant because of rape, and she opened a case of rape when she was approximately eight months. The court convicted her of rape while her rapist was acquitted for lack of evidence. The court used her pregnancy as proof of rape and her delay to open a case that she was raped. Her conviction was later overturned by the Federal Sharia Court.

It appears from the latter mentioned cases that the absence of proof of the offence of rape was viewed as an automatic admission of *zina* on the part of the complainant when the complainant had no marital relationship with the accused. In legislative terms, section 10 (3) of the *Zina* Ordinance provides that “whoever commits *zina-bil-jabr* liable to *ta'zir* shall be punished with imprisonment for a term which shall not be less than four years nor more than twenty-five years and shall also be awarded the punishment of whipping numbering thirty stripes.” The police officials automatically converted the charge of rape into *zina* under the provisions of section 10 (2) which provided that “whoever commits *zina* liable to *tazir* shall be punished with rigorous imprisonment for a term which may extend to ten years and with whipping numbering thirty stripes and shall also be liable to fine.” Or in terms of section 5 (2) of the *Zina* Ordinance which provides that “Whoever is guilty of *zina* liable to had, subject to the provisions of this Ordinance, (a) If he or she is a Mushin, be stoned to death at a public place; or (b) If he or she is not a Mushin, be punished, at a public place, with whipping numbering one hundred stripes.”

Conclusion

As already argued earlier, the testimony of four reliable male witnesses in *zina* cases constitutes discrimination against women because women are not allowed to give their testimony. Such form of evidence portrays women as human beings with a poor cognitive function and who cannot easily remember what happened. This form of evidentiary requirement was initially designed to protect women and was relevant in an ancient Islamic society where women had

little or no exposure to public affairs. However, its relevance is in serious doubt in our contemporary society that is dominated by the culture of human rights for all. This is obviously not supported by any scientific evidence and is not in line with the normative value system of the culture of human rights that is generally recognized as universal. Moreover, the usage of pregnancy as a confession to the offence of *zina* also discriminates unfairly against women. This is so because men cannot be impregnated by anyone while only women can fall pregnant. This creates an unjust situation where the male culprit for *zina* ends up being acquitted for lack of evidence while the female culprit takes the fall. In view of the legal consequences for committing the *hudud* offence of *zina*, no man in his right senses will easily confess that he has committed it. In the same vein, it is not easy if not impossible to get the evidence of four reputable male witnesses who saw with their naked eyes the actual penetration taking place as mandated by Quran. The Republic of Pakistan is a member of the international community of states that subscribe to the doctrine of human rights, and this appears from its signatures to the international human rights instruments. According to the human rights instruments, the doctrine of *pacta sunt servanda* is to be taken seriously because it mandates all states who signed the instruments to be abided by such human rights instruments.

References

1. Bassiouni, M. (1982). *The Islamic Criminal Justice System* New York: Oceana Publications, Inc.
2. El-Awa. (1982). *Muhammad Salim Punishment in Islamic law: A Comparative Study*. Indianapolis, USA: American Trust Publications.
3. Kamali, M. H. (1998). Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia. *Arab Law Quarterly* (13) 03, 203-234.
4. Lippman, M. (1989). Islamic Criminal Law and Procedure: Religious Fundamentalism v Modern Law. *Boston College International and Comparative Law Review* (12) 29.
5. Mamman, L., Soda, I.N., and Ali, S.S. (2011). *An Introduction to Islamic Criminal Justice: A Teaching and Learning Manual*. UK: UK Centre of Legal Education.
6. Nelufer, Y. and Nahid, M.H. (2020). The Condition and Consequences of
7. Adultery in Bangladesh. *Scholars International Journal of Law, Crime and Justice* (03) 01, 34.
8. Ngema, N.M. and Iyer, D. (2023). Extra-Marital Child (*walad al zina*) and their inheritance Rights under Islamic Law: A Comparison of Islamic Law and South African Common Law. *Perspectives of Law and Public Administration* (12) 1.
9. Ngema, N.M. and Iyer, D. (2023). Penalty for Committing Fornication and Adultery (*zina*) in Islamic Law as a Violation of Freedom from Torture. *OIDA International Journal on Sustainable Development* (15) 06.
10. Ngema, N. M. and Iyer, D. (2023). Extra-Marital Child (*walad al zina*) and his Right to Maintenance (*nafaqah*): A Comparison of Islamic Law and South African Common Law. *Academic Journal of Interdisciplinary Studies* (12) 02.
11. Ngema, N. M. (2023). Regulation of Adultery (*zina*) in the Context of Egyptian Human Rights Obligations. *Perspectives of Law and Public Administration* (12) 02.
12. Peiffer, E. (2005). The Death Penalty in Traditional Islamic Law
13. and as Interpreted in Saudi Arabia and Nigeria.2005 (11) 3 *William & Mary Journal of Women and the Law* (11) 3, 507-539.
14. Roberson, C., and Dilip, K. D. (2008). *An Introduction to Comparative Legal Models of Criminal Justice*. Boca Raton, FC: CRC Press.
15. Souha, K. (2018). Adultery Laws in Islam and Stoning in the Modern World. *Australian Journal of Islamic Studies*, (03) 2, 1-20.

Legislation

The *Zina* Ordinance 1979.

Case Law

Mst. Jehan Mina v State, PLD 1983 FSC 183

Mst. Fehmida v State, PLD 1982 FSC 101.

Mst. Safia Bibi v State PLD 1985 FSC 120

Rani v State 35 KLR 1996 Sh. C 150 (FSC 1996)

Gul Hamida v state 2005 P. Cr. L. J 167 (F.S.C 2004)

International Human Rights Instruments

African Charter on Human and Peoples Rights (ACHPR).

American Convention on Human Rights.

Convention on the Rights of the Child (CRC).

European Convention for the Protection of Human Rights.

International Covenant on Economic, Social and Cultural Rights (ICESCR).

International Covenant on Civil and Political Rights (ICCPR).

United Nations Charter

Universal Declaration of Human Rights (UDHR).