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بسم الله الرحمن الرحيم

مجلة اللغة العربية والدراسات الإسلامية

يصدرها:

قسم اللغة العربية والدراسات الإسلامية
جامعة ميدغوري

VOL. 3, NO. 1 (Jan. 2013)

ALLAWH

Journal of Arabic & Islamic Studies

Published By:

THE DEPARTMENT OF ARABIC AND ISLAMIC STUDIES

UNIVERSITY OF MAIDUGURI

THE APPLICATION OF ISLAMIC LEGAL MAXIMS IN NIGERIA:

THE CASE OF THE TRIAL OF SHAFIYYATU HUSSAINI



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Abstract

The re-introduction of Islamic Criminal Legal System in 1999 is a turning point in the history of shari'ah in Nigeria. Since inception, cases of criminal offences especially those that attract capital punishment have generated tension and reaction within and outside Nigeria. The trial of Shafiyyatu Hussaini is one of the celebrated cases under the new shari'ah dispensation in view of which this paper examines her trial in the light of Islamic Legal Maxims. Findings of the paper reveal that even though the established legal maxims are partly applied, gross digression from many other maxims dominates the trial. This paper suggests that the Islamic legal maxims should be given cognizance in trials in shari'ah courts and competent judges should be employed to try criminal cases under shari'ah.

Introduction.

The application of Islamic Criminal Law in Nigeria is as old as the country

itself. However, the coming of the colonial master watered the application down and until its re-introduction in 1999 with Zamfara as the pioneer state, the practice of the law has gone down the drain. The application of capital punishment in the *shari'ah* compliant states as it is obtainable under *shari'ah* has raised serious objections and reactions from within and outside the country not only because it is a strange legal system to the citizens but equally because some procedural errors are noticeable in some of the cases tried. *Al Qawā'idul Fiq-hiyyah* (legal maxims) which is a universal *fiqh* (jurisprudence) principles, expressed in legal concise statement that encompasses general rulings in cases that fall under them¹ is an inevitable instrument in passing error-free judgments in *shari'ah* courts. It is in the light of this that the trial of Shafiyyatu Hussaini under the *Shari'ah* Penal Code of Sokoto State is considered for examination.

The Trial of Shafiyyatu Hussein

Yakubu Abubakar and Shafiyyatu Hussaini, both from Tungan Tudu, Gwadabawa local government area of Sokoto State, were arraigned before the Upper *Shari'ah* Court(USC) of Gwadabawa for the offence of *Zina* (adultery or fornication) contrary to section 128-129 of Sokoto State *Shari'ah* Penal Code (SPC) 2000 on 23/12/2000. The accused were arraigned when the baby girl who was assumed to be the product of the accusation was six months old. When the two accused were made to enter their plea, Shafiyyatu admitted she was guilty while Yakubu claimed innocent of the offence.

The prosecutor produced his witnesses who were only able to testify to the time the accused were apprehended and not to the commission of the offence. The judge, Muhammad Bello, found Shafiyyatu Hussaini guilty of the offence of *zina* based on her confession and her giving birth to a baby outside a legal wedlock. Shafiyyatu was sentenced to *rajm*(stoning to death) under section 129(b) of Sokoto State SPC Law 2000.

Displeased with the judgment, Shafiyyatu filed an appeal with the Sokoto State *Shari'ah* Court of Appeal (SCA) on the ground that;

- (1) the USC Gwadabawa erred when it convicted her of the offence of *zina* on the ground that she confessed to the offence when she did not make the confession.
- (2) the USC Gwadabawa erred in law when it convicted and sentenced her to *rajm* on the ground that she delivered a child outside marriage while delivering a child by a divorced woman is not a conclusive proof of *zina* against her.
- (3) the USC Gwadabawa erred when, without first explaining the meaning of the offence of *zina*, it convicted her to that offence.
- (4) the USC Gwadabawa erred when it failed to explain to her, her right to defend herself in person or by a lawyer of her choice.

In response to the appellant's ground for appeal, the counsel to the state maintained that the appellant cannot retract her confession when pregnancy had established the offence on her and maintained that retraction can only be made in offences that attract *qisās*, (retaliatory) punishments and referred to section 166 of the Sokoto State *Shari'ah* Penal Code. He equally argued that retracting confession on behalf of an accused is not valid in Islamic law hence, the retraction made by the counsel to the accused on her behalf is invalid.

The SCA overruled the confession and the witnesses upheld by the trial court because all evidences against the appellant are on the day the police got their information; nothing is contained on the date, the time and the place the offence was committed. The validity of the appellant's confession was neither established nor was she made to understand what the word '*Zina*' means. The appeal court therefore, accepted the retraction made by the counsel to the appellant and condemned the arraignment of

Shafiyyatu. The judgment of the trial court was quashed and the appellant was discharged and acquitted.²

Even when testimony could be admitted as a proof for the offence of *zina* under Islamic law, it must be made by four men who would be able to give clear and unambiguous description of the sexual contact and the testimony should equally not be contradictory with respect to time or place.³ The fact that witnesses produced against the accused could not meet the above conditions invalidates it as an evidence for the offence committed. Other evidences to be discussed are those of the validity of the confession made by the accused and the pregnancy she bore. The position of these proofs in Islamic law are examined below.

Confession and Pregnancy as Means of Proof in Islamic Criminal Law.

Jurists agreed that confession is the highest evidence of guilt.⁴ By confession, the confessor is bound by his statement and retraction from it is only accepted in claims that absolutely involve the rights of God such as a claim of adultery and drinking, or those that are partly the rights of God and the rights of man such as theft.⁵ The legality of confession is based on the Qur'an⁶ and the hadith. It was reported that Ma'iz and Ghāmidī confessed to adultery during the life time of the Prophet (S.A.W.) and were punished on the basis of their confession.⁷ It is rationally justified that if witnesses can be accepted as a proof on a culprit, then confession by that culprit is more acceptable because it is irrational for someone to confess against himself having known the consequence of his confession. For a confession to be valid, Islam stipulates that the confessor must be mature, sane, of sound mind and not under suspicion in his confession.⁸

Pregnancy is equally considered a proof for conviction of *zina*⁹ except that it might be difficult to establish the ownership of the pregnancy when the woman

concerned is a fresh widow or divorcee because the gestation period of a woman under Islamic Law may extend to five or seven years and a child begotten within this period will be referred back to the immediate preceding husband.¹⁰ Equally, the moment the culprit did not confess or confessed but retracted her confession and four impeccable witnesses could not be produced to testify against her, Islamic law does not make it obligatory that individuals who have the knowledge of the offence must inform the authority. Reference could be made to Ma'iz bn Mālik al-Aslami who committed *zina* and went to the Prophet(SAW) on the advice of Hazzal bn Nu'aim and confessed his guilt; The Prophet(SAW) ordered him stoned to death but said to Hazzal "would that you had kept the matter hidden; this would have been better for you"¹¹

A Study of the Trial of Shafiyyatu Hussaini in the Light of Islamic Legal Maxims.

Allah stipulates confinement or corporal punishment for the offence of *zina* in the early period of Islam. The Qur'an confirms:

واللاقي يأتين الفاحشة من نساءكم فاستشهدوا عليهن أربعة منكم فإن شهدوا فأمسكوهن في البيوت حتى يتوفهن الموت أو يجعل الله لهن سبيلا

"If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them, and if they testify, confine them to houses until death do claim them or Allah ordain for them some other way" Q4:15

Allah later reveals the verse for giving stripes as an abrogate to confinement thus:

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

"For the woman and the man guilty of *zina* (fornication and adultery) flog each of them with one hundred stripes" Q 24:2

This verse of the Qur'an has a general application because the adjective '*zina*' includes illegal sexual intercourse between a man and a woman either married or not married. It therefore applies both to adultery (which implies that one or both of the parties are married to a person or persons other than the one concerned) and to fornication, which, in its strict signification, implies that both parties are unmarried.¹² A tradition was however, reported to remove the married fornicators from the ambit of the verse of one hundred stripes. The said tradition as reported by 'Ubaidah bn Šāmit states that "The messenger, may the peace and blessings of Allah be on him said "Take (this) from me, take (this) from me, verily Allah has ordained for them a way. The virgin fornicating with a virgin (should be given) a hundred stripes and one year exile, and a married person (fornicating) with a married person should be given one hundred stripes and pelting with stones"¹³

The above quoted verses as being corroborated by the tradition of the Prophet (SAW), establish the punishment for the offence of *zina* when the offence is proved. Even when the decision of the Upper *Shari'ah* Court of Sokoto State gained the support of the legal maxim 'One is responsible for his confession',¹⁴ for convicting Shafiyyatu and discharging Yakubu, it is obvious from record that Shafiyyatu does not go to the court to confess her guilt but rather, she was made to admit she committed the offence when being arraigned before the court. This stand is contrary to the practice at the time of the Prophet (SAW) as earlier discussed and whenever coercion is noticed in confession, the confession becomes invalid because "coercion prevents the validity of confession"¹⁵

Subsequent to this, Shafiyyatu's confession was accepted in her first statement without giving her any benefit of doubt. This is equally contrary to the practice of the Prophet (SAW) because Abu Hurayrah reported that a man among a group of Muslims came to the Prophet (SAW) and called, "O messenger of God, I have committed

adultery. The Prophet (SAW) turned away from him. The man confessed to that four times and when four people witnessed his claim, the Prophet(SAW) asked him, are you insane? The man replied "no" the Prophet(SAW) asked him, "you have been married before?" He replied "yes". And then the Prophet (SAW) ordered him to be stoned.¹⁶ The Prophet (SAW) in this tradition, gave the culprit the benefit of doubt by asking him whether he is insane or not before admitting his confession.

Similarly, Shafiyyatu retracted her confession but her retraction was undermined not only because it was made through her legal representative but equally because the counsel to the state states that according to section 166 of the Sokoto State Criminal Procedure Code, retraction of a confession can only be made in the case of *qisās*. These submissions cannot withstand the position of the legal maxim: "Retraction of confession is not allowed in rights of man"¹⁷ It should be understood in interpreting this maxim that crimes are of three categories; crimes that solely involve the violation of the right of men such as murder, crimes that solely involve the violation of the rights of God such as adultery and fornication and crimes that involve the violation of both the right of God and that of man such as the crime of *qadhf* (an accusation of unchasteness). Out of all these three categories, it is only the confession for crime that involves the violation of the right of man that cannot be retracted. As for Shafiyyatu, she committed the crime that involves the right of God for which retraction is allowed. Reference to this is the case of Ma'iz bn Malik who came to the Prophet (SAW) confessing his commission of adultery. The Prophet (SAW) said to him "probably you only kissed (the lady) or winked or looked at her!" he replied "No, O messenger of Allah"¹⁸ This statement of the Prophet (SAW.) showed that he wished Ma'iz retracts his confession. More so, section 166 of the Sokoto State *Sharī'ah* Criminal Procedure Code Law 2000 actually speaks of mercy in *qisās* but does not restrict it to *qisās*. It states: "A *Sharī'ah* Court having jurisdiction over *qisās* offences shall, before passing a sentence, invite the blood relatives of the deceased

person, or the complainant as the case may be, to express their wishes as to whether retaliation should be carried out, or *diyyah* should be paid or the accused should be forgiven and the court shall record such wishes in the record of proceedings”.

The case of Shafiyyatu could also be argued on the basis of lack of intentionality. Shafiyyatu Hussaini was a villager who might not have the intention of violating the Islamic rule but because she lived in a locality where traditional practices, norms and values have mixed up with Islamic tenets, she only followed the dictate of the society and hence, could be exonerated under the provision of the Islamic maxim “Actions are considered together with their intentions”¹⁹ which is a derivation of the prophetic tradition “actions are judged according to intention”²⁰

Finally, it is inappropriate to assume that pregnancy could stand as an evidence for the offence committed by Shafiyyatu because in the Maliki school, it is maintained that a woman can conceive for a period of five years before delivery as earlier mentioned and Shafiyyatu left her husband for a period less than five years hence, it becomes difficult to uphold the judgment for the offence on her because “fixed punishment should be averted in the case of doubt”²¹

Conclusion and Suggestions

This paper admits that injunctions in the *Qur'an* and in the traditions of the Prophet (SAW) are divine and immutable and the law in it is the only source of justice for mankind but posits that these injunctions need to be interpreted in the light of the provided legal maxims in Islamic law. It is the submission of the author that it is only in the accurate interpretation of these injunctions that procedural errors would be avoided in practicing Islamic Criminal Law in Nigeria and this will go a long way in showcasing Islamic law as the only legal system from where unadulterated justice could be attained.

In view of the above submission, this paper suggests that the *Shari'ah* Criminal Procedure of each *shari'ah* implementation States should be reviewed to agree with the established legal maxims. Equally, wrong interpretation of the law by legal representatives should be avoided for the sake of having fair judgments in the courts. Finally, there is the need to employ competent and broad minded judges to the *shari'ah* courts because Islamic law does not permit shallow mindedness.

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