Admissibility of Circumstantial Evidence in Shariah and Pakistani Legal System

Mahboob Usman*, Dr. Muhammad Mushtaq Ahmad**

Abstract:
Evidence plays a significant role for conviction of accused in both criminal and civil proceedings. In most of the cases direct evidence is normally unavailable, hence, circumstantial evidence is being given a vital importance by the courts globally. In the era of the Holy Prophet (ﷺ) this kind of evidence was also being relied upon to punish the criminals in certain cases. The classical Muslim jurists (Fuqha) has discussed almost all the aspects of this subject matter. In short, the jurisprudence of Islamic criminal law links the admissibility and inadmissibility of circumstantial evidence with the rights infringed. Hence, the said type of evidence is admission in certain crimes and inadmissible in others. The present paper analyses the use of circumstantial evidence for conviction in the light of Shariah and its application in the judgements of superior courts in Pakistan.
Keywords: Circumstantial Evidence, Islamic Law (Shariah), Admissibility of evidence

Introduction:

Acquiring of evidence begins with identifying the crime scene. Identification of crime scene in cybercrime cases is not an easy job as the cyberspace may have international aspects attached to it. However, there are various challenges associated in identification and collection of Electronically Stored Information (ESI), as there are variety of digital storage devices. The Law Enforcement Agencies (LEAs) or investigator by a comprehensive mechanism, diligent investigation and examination will be able to identify all important ESI in preparation for collection and preservation [(1)] of digital evidence. Casey say that the:

> First step in gathering evidence is identifying possible sources of evidence for collection. It is fairly common that identified evidence includes too little or too much information. If too much is identified, then search and seizure limitations may be exceeded, whereas if too little is identified, then exculpatory or inculpatory evidence may be missed.[(2)]

Imagine a situation where investigator is assigned a task to investigate a crime, let say fraud. When the investigator enters the office, he finds twenty computer, ten backup hard drives, fifty CDs, ten USBs and ten DVDs. Without examining these devices, the investigator will not be able to know where the relevant information

* PhD scholar at the Department of Law, Faculty of Shari'ah and Law, International Islamic University, Islamabad (IIUI)
** Dr. Muhammad Mushtaq Ahmad, Former Director-General (Shari'ah Academy) IIUI

or data is stored. Each device may be using different operating system, searching every device can be time consuming and searching all of them at the crime scene will be more complicated. Thus, it is very important for investigator to identify the potential sources of digital evidence. Investigator requires the proper assistance and help from the management of the organization or the owner of the digital device "to make a determination as to exactly what might be a source of evidence."(3) These sources can be either electronic or manual and these includes but not limited to PDAs, pagers, mobile phones, memory cards, laptops, hard drives and storage area networks (SANs).

Digital evidence is fragile and it can easily be manipulated, changed, modified, encrypted, and destroyed, making the job more difficult for the investigator to identify the relevant evidence. In addition to this, digital "evidence is comprised of three main elements, the first being binary data, the second being a storage device on which to store that binary data and thirdly, software to read and interpret the binary data."(4) Digital evidence may be altered, changed or modified by the criminals to remove all traces of its existence on computer, mobile phone and computing devices. Making more difficult for the investigator to trace "evidence of such modification may not always be possible to identify."(5) Criminal use sophisticated techniques to alter the digital information. Therefore, it is an established fact that "digital evidence may be modified without leaving any obvious trace of the commission of a transgression."(6) Therefore, LEAs requires expertise and considerable efforts to identify the modification of evidence.

When a crime is committed on cyber-space, the most important job of the investigator in the investigation is 'preservation of data', which is recovered from the crime scene or the tool which is used for committing the crime. In many cases, the criminal may destroy the evidence, therefore, it is necessary for the investigator to know how to recover the destroyed or deleted data. Whereas, in case, when the investigator is unable to recover the destroyed or deleted data or files, he may not be able to proceed with the investigation. In fact, the investigator makes maximum efforts, as much as possible to recover deleted data or files. Thus, the process of "acquiring, examining, and applying digital evidence is crucial to the success of prosecuting a cyber-criminal, with the continuous evolution of technology, it is difficult for LEAs and computer professionals to stay one step ahead of technologically savvy criminals."(7)

The most important thing in investigation of any crime is collection of evidence and preservation of the same. Every type of evidence is difficult to "collect at the best of times, but when that evidence is in electronic form, an investigator faces some extra complexities, as it has none of the permanence that conventional evidence has."(8) Stating it differently, the collection of electronic evidence is "very

expensive to collect, the processes are strict and exhaustive, the systems affected may be unavailable for regular use for a long period of time, and analysis of the data collected must be performed."(9) In many cases, the victim is unware of fraud, and sometime the LEA are informed too late which creates several obstacles for the investigator to properly investigate the case and collect the relevant evidence to prosecute the lawbreakers. Evidence can be useful information "for resolving a dispute, or completely worthless, depending on its reliability."(10)

Electronic crime is difficult to "investigate and prosecute, investigators have to build their case purely on any records left after the transactions have been completed."(11) In addition, electronic records are very malleable and electronic transactions currently have fewer limitations, which make it further difficult to investigate properly as computer records can be straightforwardly modified or destroyed. Moreover, computer transactions are very much fast, "they can be conducted from anywhere, can be encrypted or anonymous, and have no intrinsic identifying features such as handwriting and signatures to identify those responsible."(12)

Digital evidence can provide a rich treasure chest of clues about a transgression and a "clue may be considered a mistake by another name, and finding and interpreting them is what really adds to the excitement of a forensic examination. Analyzing digital evidence can be rewarding, disappointing, and often a frustrating process, but a greater understanding is always gained."(13)

In Pakistan, many problems are being faced by the investigator and LEAs, even if the details of the "transactions can be restored through analysis, it is very difficult to tie the transaction to a person."(14) Such information merely shows that "whoever did it either knew or could get past those identifiers, as the identifying information (such as passwords, PIN numbers or any other electronic identifier) does not prove who was responsible for the transaction."(15) As everyone knows that technology is "constantly evolving, investigating electronic crimes will always be difficult because of the ease of altering the data and the fact that transactions may be done anonymously."(16) The best way for the investigator is to adopt rules of evidence collection and be as diligent as possible. After all, the digital evidence is not direct evidence, rather it is circumstantial evidence. When, the direct evidence is not available, then the investigators relies upon circumstantial evidence. There are various sources to prove the commission of a crime or a right, inter alia, is circumstantial evidence. Only circumstantial evidence will be discussed in this paper.

Circumstantial evidence in Shariah:

When direct evidence is unavailable then other sources of evidence are counted on to convict the accused. Circumstantial evidence is on the top of the list of reliance.

Circumstances literally means connection, conjunction, relation, union, affiliation, association, linkage, and indication. In Islamic law, the word qarinah is used for circumstantial evidence.[17] The Lahore High Court (LHC) in Allah Rakkha v. the State, held that "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."[18]

Shariah recognizes qarinah or circumstantial evidence in judicial proceedings. The Holy Qur'an also discuss it, as in Surah Yousaf:

''وَاسُتَبَقَا الْبَابَ وَقَدَّتْ قَمِيصَهُ مِن دُبُرٍ وَأَلْفَيَا سَيِّدَهَا لَدَى الْبَابِ قَالَتْ مَا جَزَاء مَنْ أَرَادَ بِأَهْلِكَ سُوَءًا إِلاَّ أَن يُسْجَنَ أَوْ عَذَابٌ أَلِيمٌ۔ قَالَ هِيَ رَاوَدَتْنِي عَن نَّفْسِي وَشَهِدَ شَاهِدٌ مِّنْ أَهْلِهَا إِن كَانَ قَمِيصُهُ قُدَّ مِن قُبُلٍ فَصَدَقَتْ وَهُوَ مِنَ الكَاذِبِينَ ۔ وَإِنْ كَانَ قَمِيصُهُ قُدَّ مِن دُبُرٍ فَكَذَبَتْ وَهُوَ مِن الصَّادِقِينَ۔ فَلَمَّا رَأَى قَمِيصَهُ قُدَّ مِن دُبُرٍ قَالَ إِنَّهُ مِن كَيْدِكُنَّ إِنَّ كَيْدَكُنَّ عَظِيمٌ''[19]

They raced towards the door, and she ripped his shirt from behind, and they found her master by the door. She said, "What could be the punishment of him who intended evil with you wife, except that he be imprisoned or (given) a painful chastisement?" He (Yusuf) said, "It was she who tried to seduce me." And a witness from her family observed that if his shirt was ripped from the front side, then she is true and he is a liar; and if his shirt was ripped from behind, the she is telling a lie and he is truthful. So, when he (her husband) saw his shirt ripped from behind, he said, "This is certainly your trickery, O women. Great is the trickery of you women indeed.[20]

In this verse, the tearing of shirt was used as a circumstantial evidence, which proved the innocent of Hazrat Yousaf. Hence, the admissibility of circumstantial evidence is clearly established from the above referred verses of the holy Quran and the same is accepted by the courts in Pakistan.

''وَالسَّمَاء رَفَعَهَا وَوَضَعَ الْمِيزَانَ۔ أَلَّا تَطْغَوْا فِي الْمِيزَانِ۔ وَأَقِيمُوا الْوَزْنَ بِالْقِسْطِ وَلَا تُخْسِرُوا الْمِيزَانَ''[21]

He raised the sky high, and has placed the scale, so that you should not be wrongful in weighing. Observe the correct weight with fairness, and don not make weighing deficient.[22]`

The Holy Prophet (ﷺ) has admitted the circumstantial evidence in number of cases. The two young ansari boys who claimed that they have killed Abu Jahl during the battle of Badr. The Holy Prophet said to them, "Have you cleaned your swords". They said, "No". The Holy Prophet examined their swords being bloodstained, and said, "No doubt, you both have killed him".[23] It has been narrated with the authority of Nu'man Ibn al-Jariyah who relates from his father that some people brought their dispute about a hut to the Holy Prophet. The Holy Prophet sent Hudhayfath to decide their dispute. Hudhayfah decided in favor of those to whom side the bamboos of the hut had come out. When he returned and

told the Holy Prophet, the Holy Prophet reaffirmed his decision and said, "Your decision is correct".[24]

Abu Hurayrah narrated that Holy Prophet (ﷺ) said, "There were two woman who had a baby boy. A wolf came and took away one of their babies. One of them said to other, "it was your son." The other said, "No, it was your son." They brought their dispute to Prophet David and he decided in favour of the elder one. Then they went to Prophet Soloman and related to him their dispute for decision. He ordered to provide him a knife to make two pieces of the child so as to give one piece of each of them. On this the younger one said "Don't cut him into pieces, this is the son of the elder one." Hearing this, Prophet Soloman decided in favour of the younger one."[25]

It is narrated that a woman in the era of the Holy Prophet (ﷺ) was going in the dark to the mosque for prayer. Suddenly a man attacked her and overpowered her on the way and ran away. She shouted. Meanwhile, a man came by, she said: That (man) did such and such to me. And when a company of the Ansari's came by, she said: That man did such and such to me. They went and seized the accused and brought him to the Prophet Muhammad (ﷺ). When the Prophet (ﷺ) was about to pass the sentence, the actual assaulter stood up and confessed. The Prophet (ﷺ) said to her: Go away, Allah has forgiven you. and passed a judgement of stoning the confessor to death. The Prophet (ﷺ) further said: He has repented to such an extent that if the people of Medina had repented similarly, it would have been accepted from them.[26]

The Holy Prophet (ﷺ) was also asserted the term "Bayyinah" for the proof of an offence or right which is general in its nature means and includes anything that indicates and proves the commission of an offence or violation of a right whether it be the testimony of a witness(es), oath, documents, or any other evidence such as circumstantial evidence.[27]

The criminal proceedings and requirements of evidence changes according to the rights involved. For instance, circumstantial evidence is admissible in cases where the right of the ruler/state is in question. Hence, Muslim jurists concur that circumstantial evidence is acceptable in ta'zirat where the rights of state/ruler are infringed. However, they differ in accepting it in the crimes of hudud and qisas. There are three views in this matter. The Hanafis and Shafis and with one exception Hanbali reject the use of presumption in Hudud and Qisas, allowing only witnessed and confession as evidence. Their view is based on the hadith of the Holy Prophet (ﷺ) when he said, "Were I to stone anyone without evidence, I would stone so-and-so, for her speech, appearance and cohabitation are such

which raise suspicion."[28] This reinforces the rule that doubt nullifies hudud. Since a presumption is always doubtful it cannot be the basis for judgment in hudud.

It has been narrated from Jafar Ibn Muhammad who said, a woman and young man from Ansar were brouth to Umar. Actually, she loved that young man but he did not like her. So, she used a strategy and took an egg and broke it on her clothes and thighs. Then she came to Umar crying and said, this man attempted to make sexual intercourse with me and this is the proof of his offence. Umar asked the women to examine. She reported, there is semen on her clothes and thighs. So, Umar intended to punish him. On this, the young man said, O Amir al-Mu'ammin, don't hurry, I have not committed any offence. She planned to mislead. Then Umar asked Hazrat Ali for water and threw it on her clothes and thighs and collected that material and tested it. By testing he knew that it is an-egg. Thus, Hazrat Ali threatened the woman and she confessed.[29]

It has been narrated that a black man complained to Hazrat Umar and said, I am black, and my wife is also black. But my wife gave birth to a red child. His wife said to Hazrat Umar I swear in Allah that I have not committed illicit sexual intercourse with anybody and this is our legitimate son. Hazrat Umar asked Hazat Ali about the situation. Hazrat Ali said to the man, Will you give me the true information if I ask you anything, He said, Yes, Hazarat Ali said to him, Have you met your wife during her periods. He said, Yes, Hazarat Ali exclaimed with joy and said, when human sperm mixes with blood, if gives birth to a red child, so don't deny your son. You have done wrong with yourself.[30]

In modern application of Islamic criminal law, facts and circumstances may be relied upon as proof but circumstantial evidence will only be acted upon if it is of conclusive nature (Qati). Majalah[31] has inserted a whole chapters for presumptive evidence and another for judgements based on circumstantial evidence an illustration is found in Majalah stating that if a person is seen coming out from an unoccupied house in fear and anxiety with a knife covered with blood in his hand and in the house a dead-body is found with its throat cut, these facts will be regarded as proof of the fact that the person who was seen coming out murdered him.[32]

Circumstantial Evidence and Superior Courts:

According to Black's Law dictionary, circumstantial evidence is "based on inference and not on personal knowledge or observation."[33] In number of cases, the Pakistani superior courts have discussed and examined the circumstantial evidence. The circumstantial is normally used in such cases where direct evidence is not available. Therefore, to punish the accused every circumstance should be liked in such a way to each other, that the entire evidence should form a continuous chain and no link is broken. If the link is broken from the chain, then

the benefit will be given to accused person as held in Shabbir Ahmad v. the State.[34] Later on, this view was affirmed in Ameen Khan v. the State.[35]
In Binyamin v. the State the Shariat Appellate bench of SC held that circumstantial evidence is one of the recognized modes having origin from Islam to find out the guilt or innocence of accused. Such evidence, if appeals to logic and reason, then same would be sufficient piece of evidence to connect accused with commission of offence and capital punishment can be awarded on its basis.[36] Whereas in Rizwan Ali v. the Commissioner,[37] the court held that circumstantial has conclusive nature and tendency and it should exclude every possible hypothesis, except the one to be proved and chain of evidence had to be complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the violator.[38] Earlier similar view was taken by the SC in Barkat Ali v. Karam Elahi Zia.[39]
The court in Mehmood Ahmed Khan v. the State[40] held that law does not insist upon a greater degree of certainty when the evidence is entirely circumstantial. Actually, last seen evidence being circumstantial evidence in nature is a weak type of on which alone no conviction can be based as held by the SC (AJ &K) in Jamait Ali Shah v. the State.[41] In another case, the court held that circumstantial evidence though was a weak type of evidence, but if no link in the chain was found missing and circumstances would lead to guilt of accused, then conviction could be recorded on basis of circumstantial evidence.[42] In Khalid Mahmood v. the State[43] the court held that the circumstantial evidence is evidence of facts from which the facts in issue may be inferred as a natural or probable conclusion.
In Muhammad Murad v. the State,[44] case, the court disbelieved the testimony on being the eye-witnesses related to deceased and special leave to appeal, against conviction was refused by Supreme Court. In Muhammad Afzal v. the State,[45] the court relieved on the circumstantial evidence. In Muhammad Nazim v. Rehana Parveen Begum[46] the court held that men may lie but circumstances do not lie. In Abdul Karim v. Noor Muhammad[47] the court discussed and held that circumstantial evidence, in judicial proceedings, may be more cogent than the evidence of eye-witnesses, but it is extremely difficult to produce circumstantial evidence of a convincing character.
In Akhtar Hussain v. State[48] the court held that circumstantial evidence is evidence of facts from which a reasonable inference is drawn about a fact directly in issue. Whereas such evidence works cumulatively, in geometrical progression, eliminating other possibilities. However, in Mango Alias Manthar v. the State[49] the court held that circumstantial evidence in order to form basis for conviction must be free from any doubt and no other explanation should be possible except the guilt of the accused. Whereas, in Muhammad Yusuf v. the State[50] if some

inculpatory circumstances stand proved on record and if the same are found incompatible with the total innocence of accused, then such circumstances can form a valid foundation for conviction of accused person.

In Mehboob Ali v. State[(51)] regarding circumstantial evidence the court held that one should not act upon certainties alone but have to act upon just and judicious beliefs founded upon fair and rational grounds. In Muhammad Rafique v. The State,[(52)] the court held that in the case of circumstantial evidence failure of one link destroys the entire chain.[(53)] The same view was affirmed by the courts in various decisions such as in Javed v. State, the court held that in circumstantial evidence circumstances should give the complete chain, whereas one corner of which should touch the dead body of the deceased and the other, to the neck of the accused. In case of missing of one link would destroy the entire chain.[(54)] In Rehman Gul v. State, the PHC held that last seen evidence was a weak type of circumstantial evidence, therefore, such evidence could not be made basis for conviction under murder charge, strong corroboration and other pieces of evidence were needed.[(55)] In the words of V.D. Mahajan "Law requires that circumstantial evidence should be used with caution."[(56)]

While relying upon the circumstantial Pakistani courts showed extra care and were very careful, as has rightly held by LHC in in Allah Rakkha v. the State that "courts have to be very careful and critical while appreciating the circumstantial evidence. This exercise being delicate needs great care and caution."[(57)] Earlier, the Supreme Court in Naveed Asghar v. the State held that circumstantial evidence "may sometimes be conclusive, but it must always be narrowly examined……that the circumstances should be ascertained with minute care and caution, before any conclusion or inference adverse to the accused person is drawn."[(58)] In another case, regarding capital punishment the SC held that:

Placing reliance on circumstantial evidence, in cases involving capital punishment, the superior Courts since long have laid down stringent principles for accepting the same. It has been the consistent view that such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused.[(59)]

If any link in the chain is missing, it would destroy the credibility of whole evidence and the same would render entire evidence unreliable for recording a conviction on a capital charge.

Conclusions:

In absence of direct evidence, the last course of action for an investigator is to discover circumstantial evidence to establish a link between the accused and occurrence of the crime. This type of evidence is being used since long by the

courts in modern and ancient times to convict the accused. However, in modern times, digital evidence is a value-added addition in the discovery of crimes and criminals. The courts do not solely rely on circumstantial evidence being indirect evidence, rather other collaborative evidence is relied upon to convict the accused. Whereas, in Shariah, presumptive and circumstantial evidence are admissible only in tazir cases, cases where punishment is not fixed and its up-to the discretion of the judge depending on the nature of crime and the circumstances in which it was committed. The crucial point for the courts is that they have to be extra conscious while appreciating the circumstantial evidence in criminal proceedings. Fabrication chances are much higher when the sole reliance is on circumstantial evidence, therefore, courts should take extra care.

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19. Quran 12: 25-28.
20. Quran 12: 26-28.
21. Quran 55: 7.
22. Translation of this verse has been taken from Quran-e-Karim, translated by Justice Mufti Taqi Usmani.
23. Sahih al-Bukhari 3141; Sahih Muslim 1752.
24. Ibn Majah, Al-Sunan, ii, 171.
25. Sahih al-Bukhari 6769; Sahih Muslim 1720a; Sunan an-Nasa'i 5402; Riyad as-Salihin 1827
26. Sunan Abi Dawud 4379; Jami` at-Tirmidhi 1454; Mishkat al-Masabih 3572
27. Muhammad Ibn Abu Bakr Shams al-Din Ibn al-Qayyim Al-Jawziyyah, Al-Turuq al-Hukmiyyah fi al-Siyasah al-Shariyyah (Cairo: Maktabah al-Muhammadiyyah, 1973), 7
28. Sunan an-Nasa'i 3470 & 3471
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