



ADMISSIBILITY OF DOCUMENTARY EVIDENCE IN PROVING CRIMINAL CASE

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INTRODUCTION

Documentary evidence is a conclusive form of evidence which is accepted generally under transaction dealings and other civil matters. Contradiction in its application of *hudud* cases and *qisas* cases seems to evolve the law of evidence as the impact is greater compared to evidence tendered by *syahadah* or *iqrar* in the court room.

DEFINITION OF ‘DOCUMENTARY’: AN EXPANSION

Discussion on documentary evidence is one of the most important sections under Islamic Law of evidence. Defining the documentary evidence nowadays which embraces a wider scope should be thoroughly determined and clearly defined as it would function in all latest appliances and modern devices as not to left out all the old style of letters or wooden marks and scripture.

Ibn Qayyim and many legal jurists including *Imam Nawawi* and *Imam Shafi'e* observe that a sign or mark on the calf of animal which indicate ‘charity’ or ‘*waqf*’, or stone or entrance or wall of a house or on books of knowledge which indicates that is ‘*waqf*’ is concrete proof for judgment.

Ibn Qayyim gives the term *wathiqa* or document is not only limited to pieces of paper and highlighted that prime characteristic and test of a document is that it should contain and convey information¹.

According to *Mohamed Burhan Arbouna*, document embraces any inscription or matter on wood, stone, metal or any tangible substance capable to store information².

Ibn Hajar in *Fathul al Bari Sharah Sahih Bukhari* explained that historically, al Quran was assembles in one book through the assistance of various verses written on parchments or vellum, tablets, stones, clay or pottery, bones, palm branches and patches.

Prof Dr Anwarullah gives a modern approach by detailed out means that convey information; as illustrated by *Ibn Qayyim*; that documents include books, maps, pamphlets, magazines, planes, charts, drawings, photographs, lithographs,

1 Mohamed Burhan Arbouna, *Islamic Law of Evidence: The Function of Official Documents in Evidence*, p.18

2 *Ibid*, p.17

graphs, soundtrack, written and printed material¹. He also said that the admissibility of such documents produced by computer in civil cases provided that the operation of the computer is carried out properly at the material time is relevant.

In the case of *R v. Daye*²; Darling J stated that

“...any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed on paper, parchment, stone, marble, clay, or metal. A document is not limited to writing on paper, but a matter is a document no matter upon what material it be, provided it is writing or printing and capable of being evidence”

*Hill v R*³, it is said that;

“A document must be something which teaches – something which affords informationit may be anything on which the information is inscribed”

Broader meaning of document imparts a great impact which affects all mediums that conveys information at the material time.

The nature of this evidence may be deleted or demolished or burnt or missing or hidden or hardly to track back; but; as long as the act of documentation or recording information had taken place, the documentary evidence relevance applied accordingly in this area.

By virtue of the sayings of *Zaid ibn Thabit*; *“I retrived Quran from the heart (memory) of men”*, which by inference alludes to all modern forms of documents⁴, it is appropriate to expend the meaning of document in this day and age.

DOCUMENTARY EVIDENCE IN HUDUD, QISAS AND TA’ZIR CASES.

A group of jurist accepted documentary evidence be used as proof in all cases as to safeguard the interest of society.

1 Prof Dr Anwarullah, *Principles of Evidence in Islam*, p. 121

2 [1908] 2 KB 333

3 [1945] 1 KB 329

4 Mohamed Burhan Arbouna, *Islamic Law of Evidence: The Function of Official Documents in Evidence*, p.20

And another group of jurist stated that documentary evidence may not be used as a means of proof even in property cases as writings may bear resemblance with other writings and documents may be copied or forged¹ or fabricated.

The first group that accepts documentary evidence in all cases is divided into two opinions.

Firstly, documentary evidence may be used as a means of proof in all types of cases including *hudud* and *qisas*, regardless whether it may be a government document, a judicial document or ordinary citizen's document or sealed or unsealed document. Secondly, documentary evidence is only admissible in cases which are not in the *hudud* and *qisas* categories which only apply in *ta'zir* cases and civil matters such as contract.

From the view of *Ahmad Fathi Bahansi*, in criminal cases, documentary evidence does not play a major role under the *fiqh* unless the document is in the form of an admission of crime (*hudud*, *qisas* or *ta'zir*).

If the documentary evidence contains an admission of a *hudud* case and the accused affirms it, it is considered as making the admission for the second time. In the event that the accused refuses to affirm, it is the same as if he is retracting his admission or confession. Admission in documentary in *hudud* cases is limited and cannot be the basis of proof because it is dependent on the affirmation of the accused of the statement.

If the document contains an admission of murder which entails *qisas* and he affirms it, the punishment shall be imposed on him. Or otherwise, he entails the mandatory *qasamah* and such statement amount to *lauth*². For that reason, documentary evidence may be considered in *qisas* offences.

A judge may use his discretion when it comes to an admission of a *ta'zir* offence. If the judge satisfied with the contents and authenticity of the admission, the accused will be liable for *ta'zir* or otherwise, no punishment shall be imposed upon him.

Majority of jurist unanimously agree that in matter related to *haqqul 'ibad* or rights or *ta'zir*, documentary evidence is relevant provided that it is free from forgery.

1 Mahmud Saedon A Othman, *An Introduction to Islamic Law of Evidence*, p. 139

2 *Ibid*, p. 140

According to *Ibn Qayyum*, *Imam Abu Hanifah* said that, documentary proof is sufficient proof for rights and *ta'zir* crimes provided the judge is satisfied about it¹.

Abu Yusuf and *Muhammad* in the opinion that if a document is found in the official record of a court duly signed by the authorized officer, it is sufficient proof in civil matters and *ta'zir* crimes even the judge does not know about it.

Imam Malik considers documentary evidence is a sufficient proof until it is known to the judge. *Imam Shafie* accepted documentary evidence provided it is free from forgery while *Iman Ahmad* (one of the view) said that it is sufficient proof if it is known to the judge.

Throughout the discussion on acceptance of documentary evidence in criminal cases, it is clear that, any document be it a letter or a photograph, the authenticity of such document must be proven at the first instance and to be coupled with the admission of the maker or writer in order to be admitted as relevant evidence in the court room. Mere approval is rejected and not appropriate in criminal cases.

DISPUTES ON ADMISSIBILITY OF OFFICIAL DOCUMENT AS PROOF IN CRIMINAL CASES

By virtue of the diplomatic correspondence between Prophet Sulaiman and the queen of Sheeba by name of *Balqis* through an official letter, and Prophet Muhammad s.a.w. continuously documented official letters to the rulers² and duly executed by all the governors and judges; those documents strongly indicated the historical acknowledgment of official documents in respect of evidence.

In order to admit such official document as relevant evidence, general qualifications are essential and should be fulfilled according to *Abdul Haseeb*, *Ahmad Ibrahim Baik*, *Muhammad Ma'ajuuz* and *Ibn Qudamah*.

Firstly, the facts must be made by the authorized public agent in the course of duty. Secondly, the document is made by the direction of duly qualified public officials. Thirdly, observes the rules of the law of evidence and procedure in order to validate such document as evidence. Fourthly, the document must be produced by the person who supervised such document. With

1 Prof Dr Anwarullah, Principles of Evidence in Islam, p.121

2 Mohamed Burhan Arbouna, *Islamic Law of Evidence: The Function of Official Documents in Evidence*, p. 54

regard to these requirements, the court is duty bound to accept any document produced whether in civil cases or in criminal cases¹.

There are several views thrown out by the scholars regarding the admissibility of official documents as proof in criminal cases. *Muhammad Abduh* said:

“any judge would not hesitate to incline to the fact that an information prepared by a police officer in the course of duty is more reliable than the oral testimony of a number of witnesses whose credibility is unknown especially if one takes into consideration unreliable witnesses who constantly do knock the door of courts to deposit false testimony..”

Muhammad Mustafa al Zuhaily (as *Imam Mawardi*) prefers the distinction between *haqquLlah* (documentary evidence is inadmissible) and *haqqul ‘ibad* (documentary evidence is admissible) in producing official document in criminal cases.

Prof Dr Anwarullah said that official documents shall be admissible as evidence for their contents without any further inspection and enquiry². Hence, the document of a judge to a judge or official documents is inadmissible in criminal cases. Since criminal convictions need to be proved beyond reasonable doubt, direct oral evidence is necessary for cross examination in the presence of the defendant. *Wahbah Zuhaily* and *Ahmad Fathi Bahansi* also limited the admissibility of letter the judge to a judge or official documents in cases involving property or civil matters.

LEGAL FRAMEWORK REGULATING DOCUMENTARY EVIDENCE

The *Mejelle* also admit documentary evidence as a proof and clearly stated in Article 69 “*Correspondence by writing is like talking to one another*”³, Article 1606 “*An admission in writing is like an admission by word of mouth*”, Article 1607 “*A person’s giving another an order to write a confession for him is in effect an admission*” and Article 1608 “*The entries of a merchant, in his book which are in order, are also a kind of admission by writing*”⁴

1 *Ibid* p.57

2 Prof Dr Anwarullah, Principles of Evidence in Islam, p.122

3 Mahmud Saedon A Othman, *An Introduction to Islamic Law of Evidence*, p. 202

4 *Ibid*, p. 147

Section 3 of the Evidence Act 1950 define as the same with Section 3 of the Shariah Court Evidence (FT) Act 1997 that any matter expressed, described-including disc, tape, film, sound track and any device by means of (a) letter, figures, symbols, signals, signs or other form (b) any visual recording (still or moving image) (c) any sound recording – electronic, magnetic, mechanical or any sounds, electronic impulses or data (d) a recording or transmission, over a distance of any matter by any or combination of the means in (b) and (c).

Section 48 to Section 71 of the Shariah Court Evidence (FT) Act 1997 stated that Primary Evidence – document for the inspection of the court (document produced by computer) and Secondary Evidence – certified copies, copies made from the original by mechanical process, copies made from the original, oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means.

Section 3 of the Interpretation Act 1967 all to include a disc, tape, film, microfilms, photograph or negative, sound track, computer based, other devices-printed and other recorded matters such as communication instruments and all current forms of production of document.

In acknowledging documentary evidence in criminal cases, the law can invoke Section 90A of the Evidence Act 1950 whereby the court may accept documents produced by computers, and of statements contained therein provided that the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement or by tendering to the court a certificate signed by a person who is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

It shall be sufficient, in a certificate given under subsection be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human

intervention. And no such on behalf statement should be accepted in giving evidence upon the document produced by a computer.¹

In this law, the legislator seems to rely upon the court to undergo an authentication stage of a document that produced by any means such as computer which is prepared by the authorities.²

Case of *Mohd Ali bin Jaafar v PP* and *PP v Dato' Seri Anwar Ibrahim*; Augustine Paul J stated that evidence of tape recording produced by the police officer is accepted provided that the

- (a) tape run through and found to be clean before the recording
- (b) machine is in proper working order
- (c) tape was not tampered or altered in any way and established in whose possession at all times
- (d) witness played the tape – which they can identify
- (e) witness played the tape and checked it with the transcript as to the density of the voices and to the conversation

*Com. V Copenhefer*³ the defendant was convicted of first degree murder based, in part, on evidence obtained from his computer's hard disk. The defendant had drafted and stored copies of a ransom note and other information detailing his kidnapping scheme. An FBI expert was able to retrieve copies of these documents that the defendant had mistakenly believed had been successfully deleted.

*Kajala v Noble*⁴ where a copy of a BBC video recording was admitted in evidence against the defendant who was charged with using threatening behavior. The QB Div Ct held that the copy recording was admissible as real evidence of what happened. No need to produce the original recording to the court, proving there is satisfactory evidence that the copy is genuine, and that it has not been tampered with.

1 Wan Abdul Fatah Wan Ismail dan Zulfakar Ramlee, "Keterangan Melalui *Kitābah*: Menurut Fiqh dan Undang-Undang Semasa di Malaysia", *Jurnal Undang-Undang dan Masyarakat*, No.17 (2014): 11

2 Wan Abdul Fatah Wan Ismail, Nik Salida Suhaila Nik Saleh dan Norma Jusoh, "Pengesahan Dokumen Melalui Sumpah: Menurut Fiqh dan Amalan di Mahkamah Syariah di Malaysia", *Shariah Law Reports* (2014): Iiii.

3 587 A.2d 1353 (1998)

4 1982 -75 Cr App R 749

In *Derby & Co Ltd v Weldon*¹ where Vinelott J held that a computer database which formed part of the business records of a company was, so far as it contained information capable of being retrieved and converted into readable form, a 'document' and therefore susceptible to discovery².

Case of *Stevenson*³, Kinler Brown J held that tape recordings had to be proved to be genuine before they were admissible.

In a criminal case, the standard of proof would be beyond reasonable doubt. In civil cases, they have to prove the recording genuine is on the balance of probabilities.

It is concluded that there is no difference between the audio tapes, video tapes and photographs. For example, photographs of radar recordings were admitted in *The Statue of Liberty*⁴ to prove the position of two ships at various times before they collided. Similarly the print out from a computer which performed calculations was admissible in *Wood*⁵ to prove the chemical composition of metals, and a print out from a breath testing machine was allowed as evidence of the amount of alcohol in a drivers' breath in *Castle v Cross*⁶. No difference as all the machines did is to record facts.

In the case of *R v Maqsood Ali*⁷, the accused was convicted of murder and the prosecutor adduced a tape-recording of conversation (while waiting in a bugged office) made between the accused and his co-accused. After the police left the room, they discussed the murder in foreign dialect - not only the tape was unknown language but also considerable interference in recording – the translation made in Urdu, then to English.

The judge stated

"...we must not be taken as saying such recordings are admissible whatever the circumstances, but it does appear to the court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided also that evidence is relevant and otherwise"

1 (No 9) [1991] 2 All ER 901

2 Rosamund Reay, *Evidence*, p. 344

3 1971 1 WLR 1

4 1968 1 WLR 739

5 1982 76 Cr App R 23

6 1984 1 WLR 1372

7 [1965] 2 All ER 465

admissible, we are satisfied that a tape recording is admissible in evidence”

CONCLUSION

Fiqh in Islam is an area that can be changed as the time and circumstance transform. The alteration of some ruling is to accommodate the society with safety and protection to the five *maqasid syari'iah*.

As the society growth in line with the technologies and modernization, the rule of documentary evidence should also chase the development as to reach the true meaning of 'document' in this millennium era. Undeveloped and immature or stagnancy of the terminology of 'document' will create a huge boundaries, borders and difficulty in applying the *syariah* up to the maximum level.

Debate with regard to admissibility of document in criminal cases is a crucial quandary that should have the yardstick in its implementation.

One might say that the admissibility of documentary evidence in criminal cases is upon the basis of *dharura* (necessity) and *Maslahah al Mursalah* or public interest. However, such an attitude was precautionary measure taken by some jurists as far as criminal cases are concerned.

With the trust of the community on the government, the production of official document as evidence should be governed as a whole so as to be accepted in the court room without any further investigation. Although it might be contested, the contesting party that put forward the question or doubt, or contest the authenticity of such evidence, they should come with other cogent evidence in disapproving such documentary evidence.

All in all, for the benefit of all parties i.e. the prosecutor and the accused, the admissibility of documentary evidence should be accepted in the court room in criminal cases provided that such document was produced through its prescribed manner and procedure. Although the evidence should be proven beyond any reasonable doubt or level of *ghabah dzan*, the documentary evidence in criminal cases still have the weight and capable to stand on its own.

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