

The Scope and Application of Similar Fact Evidence under the Evidence Act 1950: Introduction and Its Overview from the Perspective of Islamic Law of Evidence

MAZUPI ABDUL RAHMAN
AHMAD 'AZAM MOHD SHARIFF

ABSTRACT

The Principle of Similar Fact Evidence has been well outlined in Section 11(b), Section 14 and Section 15 of the Malaysian Evidence Act 1950. Its scope and application by the Malaysian Courts have always come under close scrutiny and comments as the Malaysian Judiciary often adopts a critical and analytical approach when deciding on the question of admissibility of such evidence. This short article however aims at giving a very brief and basic introduction to the scope and application of similar fact evidence as applied by the Malaysian courts in the simplest possible manner. At the same time, since the principle is relatively new to the Syariah, this article also strives at briefly analyzing the principle of similar fact evidence in the eyes of Islamic Law of Evidence and suggesting for its applicability and admissibility in the Syariah courts if such evidence is to be tendered by any party in a Syariah criminal or civil trial. It is humbly hoped that this writing could, in the future, provoke a more detailed and juristic study on the admissibility of evidence of a similar fact in the eyes of Islamic Law of Evidence and Islamic Judiciary

ABSTRAK

Prinsip 'Similar Fact Evidence' jelas terkandung dalam Seksyen 11(b), Seksyen 14 dan Seksyen 15 Akta Keterangan 1950. Malah, skop serta pengaplikasian prinsip berkenaan dipantau rapi oleh mahkamah-mahkamah di Malaysia yang sering menggunakan pendekatan analisis lagi kritis dalam memutuskan kebolehterimaan keterangan sedemikian. Sungguhpun begitu, artikel ini hanya membincangkan skop serta pengaplikasian keterangan 'similar fact' di mahkamah-mahkamah di Malaysia secara ringkas. Artikel ini juga turut menganalisa prinsip 'similar fact evidence' dari perspektif Undang-Undang Keterangan Islam serta mencadangkan kebolehterimaan keterangan sedemikian sekiranya ianya dikemukakan dalam perbicaraan kes-kes mal dan jenayah di mahkamah syariah. Semoga artikel ini, di masa hadapan, akan menjadi pencetus kepada kajian-kajian lain yang lebih mendalam tentang kebolehterimaan keterangan berbentuk 'similar fact' di sisi Undang-undang Keterangan Islam serta badan Kehakiman Islam itu sendiri.

INTRODUCTION

Similar Fact Evidence is the evidence adduced in court to prove that the accused has previously been guilty of misconduct other than that charged; and such evidence of previous misconduct by the accused is made admissible to prove guilt by virtue of them being similar to that of the offence of which the accused is currently being charged. The principle of admissibility of similar fact evidence could be found in a string of English cases which are often considered and quoted by the Malaysian judges when deciding on the relevancy and admissibility of such evidence. In *Makin v. AG for New South Wales*,¹ Lord Hershell, for instance, had laid out the principle regarding admissibility of evidence of similar facts when he said:

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.²

The principle on admissibility of similar fact evidence was later on reformulated by Lord Wilberforce of the House of Lords in the English case of *Boardman v. DPP*³ which resulted in the above principle being given a new outlook. Lord Wilberforce summed-up the fresh approach taken in deciding the admissibility of similar fact evidence in the following words:

...the admission of similar fact evidence ...is exceptional and requires a strong degree of probative force. This probative force is derived...from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witness or from pure coincidence.⁴

Hence, the relevancy and admissibility of similar fact evidence now warrants a careful consideration on the part of the presiding judge in evaluating the probative value and the prejudicial effect of such evidence before deciding on its relevancy

¹ [1894] AC 57.

² Ibid., pg. 65.

³ [1975] AC 421.

⁴ Ibid., pg. 444.

and admissibility. If the judge feels that admission of such evidence of previous similar facts committed by the accused would be too prejudicial to the accused in which the accused would then have been victimized, this shows that the prejudicial effect of admitting such evidence has outweighed its probative value and thus the evidence should not be admitted in the court of law.⁵ If, conversely, the judge feels that the evidence of such previous similar acts committed by the accused is so overwhelmingly strong as the result of these facts, being amply corroborated by evidence and bearing such a striking similarity with the crime of which the accused is currently being charged, which in turn, gives rise to a high degree of probability that the accused has indeed committed the current offence, this would only show that the probative value of admitting such evidence has far out-weighed the prejudicial effect and hence the evidence of such facts should be admitted by the court.⁶ The above approach could best be explained by the wordings of Lord Salmond in the case of *Boardman v. DPP*:

If the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused the manner in which the other crimes were committed may be evidence upon which a jury could reasonably conclude that the accused was guilty of the crime charged. The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence.⁷

The above principle on relevancy and admissibility of similar fact evidence, reformulated by the House of Lords in the celebrated case of *Boardman v. DPP*⁸, has always been cited with approval by the Malaysian courts⁹ as acknowledged by Peh Swee Chin J in *Public Prosecutor v. Veeran Kutty & Anor*.¹⁰ Perhaps, the applicability of the Boardman's principle on the relevancy and admissibility of similar fact evidence in Malaysia could best be summed-up with the decision of the Supreme Court in the case of *Junaidi bin Abdullah v. Public Prosecutor*:¹¹

On the principle laid down in Makin's case and Boardman's case, we are of the opinion that where the purpose of adducing evidence of similar facts or similar offences is justifiable ... it is admissible in evidence provided the probative value ... outweighs its prejudicial value.¹²

⁵ See also Norbani Mohamad Nazri, 'Junaidi bin Abdullah v. PP: Principles of Similar Fact Evidence' [1994] 3 *MLJ* cexxii.

⁶ See *Junaidi bin Abdullah v PP* [1993] 3 *MLJ* 217, 226–227.

⁷ *Boardman v DPP* [1975] AC 421, 462.

⁸ See also *DPP v Boardman* [1974] 3 All ER 887 (HL).

⁹ See also Abu Bakar Munir, 'Similar fact evidence: Probative value v. Prejudice' [1994] 3 *MLJ* xxix.

¹⁰ [1990] 3 *MLJ* 498, 504; [1990] 2 *CLJ* 673, 680.

¹¹ [1993] 3 *MLJ* 217.

¹² *Ibid.*, pg. 226-227.

Generally speaking, similar fact evidence which tend to show that the accused has been guilty of previous criminal offence¹³ or has a disposition to commit the kind of crime charged or crimes in general¹⁴ is inadmissible for the purpose of leading to the conclusion that the accused had in fact committed the crime for which he is currently being charged. However the Malaysian Evidence Act 1950 has outlined three exceptions to the above general rule in which similar fact evidence may become admissible in situations verified under sections 11(b), 14 and 15 of Evidence Act 1950.¹⁵ The wordings of these provisions are as follows:

Section 11(b):

Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.¹⁶

Section 14:

Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.¹⁷

Section 15:

When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of a series of similar occurrences, in each of which the doing the act was concerned, is relevant.¹⁸

However, for the purpose of understanding the scope and application of each provision, it is perhaps best to discuss each of the above provision separately.

THE SCOPE AND APPLICATION OF SECTION 11(B) OF THE EVIDENCE ACT 1950

Section 11(b) presents the first situation whereby similar fact evidence may sometimes become relevant and thus admissible in court. The wording of section

¹³ See *Makin v. AG for New South Wales* [1894] AC 57.

¹⁴ See Abu Bakar Munir, 'Similar fact evidence: Probative value v. Prejudice' [1994] 3 *MLJ* xxix.

¹⁵ See *R v. Raju & Ors* [1953] MLJ 21, 22 (HC).

¹⁶ Section 11(b) of the Evidence Act 1950 is *in pari materia* with Section 11(b) of the Indian Evidence Act.

¹⁷ Section 14 of the Evidence Act 1950 is *in pari materia* with Section 14 of the Indian Evidence Act.

¹⁸ Section 15 of the Evidence Act 1950 is *in pari materia* with Section 15 of the Indian Evidence Act.

11(b) provides that facts, may become relevant either by themselves or in connection with other facts, if these facts render the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.¹⁹ This signifies that facts which tend to render the existence or non-existence of the fact in issue or the relevant fact in a particular case highly probable or improbable, are relevant and admissible under this section.²⁰ It must also be noted that in proving the ‘high probability or improbability’ of a fact in issue or a relevant fact in a particular case, it must be shown that there is a close and immediate connection between the fact in issue or the relevant fact in that case and the collateral facts sought to be proved.²¹ Indeed, the facts sought to be proved must be so closely and imminently connected with the fact in issue or the relevant fact in the particular case, so much so that the court would have to take these facts into consideration when arriving at their judicial decision.²² Now, applying the principle of similar fact evidence under Section 11(b) to a criminal trial, the evidence of previous similar acts by an accused may thus become relevant and admissible in the court of law if such evidence renders the existence of the *actus reus*, which has become the fact in issue in the present criminal proceeding, highly probable.²³ In fact, in proving the ‘high probability’ of the above-mentioned fact in issue, the immediate and imminent connection between the fact in issue (i.e. in this instance, the commission of the *actus reus*) and the collateral facts sought to be proved (i.e. facts and evidence of previous similar acts by the same accused) must be explicitly shown.²⁴ This point has been clearly illustrated by Mitter J in the Indian case of *R v. Vyapory*:²⁵

The words ‘highly probable’ point out the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the co-existence of the two highly probable.

The relevancy and admissibility of a similar fact evidence under section 11 (b) of the Evidence Act could further be illustrated with the case of *Abu Bakar bin Ismail v. R.*²⁶ In this case the appellant, who was an assistant licencing

¹⁹ See Section 11(b) of the Evidence Act 1950. See also Section 11(b) of the Indian Evidence Act as mentioned by Sudipto Sarkar & V R Manohar, *Sarkar on evidence*, Wadhwa & Company Law Publishers - Agra-Nagpur-New Delhi, India, 1999, 15th Ed., Vol. 1, pg. 254.

²⁰ Sir John Woodroffe & Syed Amir Ali, *Law of evidence*, Butterworths India, New Delhi, 2001, 17th Ed., Vol. 1, pg. 1032.

²¹ See *Bhupendra Singh v. State of Madhya Pradesh* 1991 Cr. LJ 26 (MP).

²² Sir John Woodroffe & Syed Ali, *Law of evidence*, pg. 1032.

²³ Augustine Paul, *Evidence: Practice and procedure*, Malayan Law Journal Kuala Lumpur, 2000, 2nd Ed., pg. 111.

²⁴ Sir John Woodroffe & Syed Amir Ali, *Law of evidence*, pg. 1011.

²⁵ ILR 6 C 655, 662.

²⁶ [1954] MLJ 67.

officer, was entrusted with the duty of approving applications for driving licences. There had been applications by the applicants to obtain driving licences in Singapore. The fact in issue was whether the applicants had, when applying for the Singapore's driving licences, produced their federation licences for the appellant's inspection as required by law or not. In giving their evidence in court, Ng Jim Sim and Chan How Aik who both testified that they have paid one Koh Chwee Kim some money for his service in getting the driving licences, together with Koh Chwee Kim himself, told the court that they did not produce to the appellant any federation driving licences during the application. The appellant of course denied this. The prosecution, during the criminal trial, had relied on similar fact evidence when they called evidence to prove that on eight previous occasions between 29 September and 29 October 1952, the appellant had made similar endorsements to the effect that he had seen Federation driving licences in the case of eight applicants whose forms he had filled in, and that in none of these eight cases had the applicant produced driving licence for the appellant's inspection. The appellant was convicted of the offence by the trial court and, in the present case, appealed against his conviction. One of his grounds of appeal in the present case was on the similar facts evidence adduced earlier by the prosecution which the court held to be relevant and admissible. Brown Ag CJ,²⁷ in the present appeal case, pointed out that the fact in issue was whether the Federation driving licences were produced to the appellant for his inspection or not on the dates referred to in the charge. He also stressed on the question of whether the facts (i.e. the eight previous similar acts by the appellant in which he made similar endorsements without any federation driving licence being produced) made it 'highly probable' that no federation driving licences were produced upon the two dates which were material to the charge.²⁸ It was decided on appeal that the similar fact evidence objected by the appellant was indeed relevant and admissible as the facts (i.e. the evidence of eight previous similar acts committed by the appellant) did show (and in fact it went far beyond that), that the appellant was the person who was likely to have committed the two acts with which the appellant was charged.²⁹

However the relevancy and admissibility of fact which renders the existence of any fact in issue 'highly probable' has its own limitation. The case of *Ismail v Hasnul : Abdul Ghafar v. Hasnul*³⁰ explains this limitation. In this case, Tun Tan Siew Sin, the Minister of Finance at that time, brought an action for slander against the respondent in 1964. The respondent totally denied making the defamatory statements which were published in *Utusan Melayu* and imputed

²⁷ *Ibid.*, pg. 68-69.

²⁸ *Ibid.*

²⁹ *Ibid.* See also Augustine Paul, *Evidence: Practice and procedure*, pg.112.

³⁰ [1998] 1 MLJ 108.

to him. In establishing this line of defence, the respondent wished to call up the appellants as his witnesses to testify that on other previous occasions, Utusan Melayu had published defamatory statements of the respondents which was purportedly to have been made by the appellants. Subsequently, the appellants had requested Utusan Melayu to publish denials of such statements. Raja Azlan Shah J held that such evidence that the respondent wished to bring up in court to deny his liability did not come within the ambit of section 11(b) of the Evidence Act. Section 11(b), in fact, has its limitation as the section did not make admissible any collateral facts which were not reasonably conclusive and which bore no connection with the main fact. Raja Azlan Shah J went on to observe that in the case before him, whether the respondent had slandered the plaintiff was the main fact. According to him, evidence of other defamatory statements made by a third party like the appellants of the plaintiff were relevant under this section in showing the probability that the slander was uttered by the third party. However, section 11(b) would not come into play in a pending suit when a third party has libeled the respondent because that would have no connection to the main fact. Furthermore, as the judge emphasized, the collateral facts were not conclusive in the present case as the appellants had technically denied publishing the defamatory statements and the other occasions.³¹

THE SCOPE AND APPLICATION OF SECTION 14 OF THE EVIDENCE ACT 1950

Similar Fact Evidence may also become admissible if it conforms with the provision of section 14 of the Evidence Act. Section 14 of the said Act explains that evidence and facts showing the existence of a similar state of mind of a person, or a similar state of body or bodily feeling by the person may become relevant and, hence, admissible in the court of law when the existence of such state of mind or such state of body or bodily feeling is in issue or relevant in the present case involving the same person.³² While it is difficult to prove one's state of mind during one's commission of an act, it is nevertheless not too impossible a task. As Bowen LJ said in the case of *Edington v. Fitzmaurice*:³³

It is true that it is very difficult to prove what the state of a man's mind at a particular time is; but if it can be ascertained it is as much a fact as anything else.

³¹ Ibid., at pg. 111-112. See also Augustine Paul, *Evidence: Practice and procedure*, pg. 113.

³² Section 14 of the Evidence Act 1950. See also Section 14 of the Indian Evidence Act as mentioned by Sudipto Sarkar & V R Manohar, *Sarkar on evidence*, pgs. 309, 310.

³³ (1885) 29 Ch D 459.

The three illustrations below could further enlighten the provision of section 14 of the Evidence Act which may admit evidence regarding similar state of mind of a person or similar state of body or bodily feeling by the same person when such state of mind or state of body or bodily feeling is in issue or relevant in the present case:

Illustration 1: A is accused of fraudulently delivering to another person a counterfeit coin, which at the time when he delivered it he knew to be counterfeit. As such, the fact that at the time of its delivery, A was in possession of a number of other pieces of counterfeit coin is relevant. Meanwhile, the fact that A had previously convicted of delivering to another person a counterfeit coin as genuine, knowing it to be counterfeit is also relevant.³⁴

Illustration 2: A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact that A had previously published a defamatory material of B, showing the ill-will on the part of A towards B, is relevant in proving A's intention to defame B by the particular publication in question. On the other hand, the fact that there was no previous quarrel between A and B, as well as the fact that A had repeated the matter complained are relevant in showing that A did not intend to defame B.³⁵

Illustration 3: A is charged with shooting at B with the intention of killing him. The fact that A had previously shot at B is relevant in showing that he had the intention to kill B.³⁶

It is extremely important to note that in admitting facts and evidence regarding such similar state of mind or such similar state of body or bodily feeling of the accused or a party of a civil case, it must be shown that the state of mind or the state of body or bodily feeling must have a direct and immediate reference to the fact in issue. This has been pointed out by the courts in the cases of *Teo Koon Seng v. R*³⁷ and *Public Prosecutor v. Teo Ai Nee & Anor*.³⁸ This point can be clearly explained by the following illustration:

Illustration: A is charged of murdering B by intentionally shooting him dead. The fact that A on other occasions had shot at B is relevant to prove A's intention to shoot B. On the other hand, the fact that A was in the habit of shooting at other people with the intention of killing them is irrelevant and inadmissible.³⁹

³⁴ See illustration (b) of Section 14.

³⁵ See illustration (e) of Section 14.

³⁶ See illustration (i) of Section 14.

³⁷ (1936) MLJ –Rep 9, 10 (HC).

³⁸ [1995] 2 SLR 69, 93-94 (HC).

³⁹ See illustration (o) of Section 14.

It is also important to observe that section 14 of the Evidence Act not only admit facts and evidence regarding previous state of mind or state of body or bodily feeling of a person, but also admit facts and evidence of similar acts subsequent to that for which the accused has been charged.⁴⁰ In addition to the above, it must also be understood that section 14 which may regard similar fact evidence relevant and admissible under its provision applies in both criminal as well as civil cases,⁴¹ and that hearsay evidence is admissible under the section when proving the state of mind of a person.⁴²

To illustrate the application of section 14 of the Evidence Act further, lets scrutinize the two cases below. In the case of *X v. Public Prosecutor*,⁴³ the appellant, who was a tapper in an estate, went to the bungalow of a member of an estate staff on 14 October 1950 and told him that the bandits came and wanted some money from him. The appellant first asked for 10% of his salary and when his demand was not met, the appellant then asked the staff to give him at least \$10. When that request was turned down too, the appellant went on to insist that he be given \$10 on pay day. The prosecution tendered evidence to show that the appellant consorted with bandits who had visited the same estate on 27 October 1950 and that the appellant had aided and abetted the bandits during that visit. The court observed that it was the duty of the prosecution to prove that the money demanded by the appellant was intended for the use of the bandits who intended or were about to act or had recently acted in a manner prejudicial to public safety and public order. The Court took into consideration the evidence which led to the conduct of the appellant during the incident on 27 October 1950 and held that it was highly probable that the appellant's statement when demanding for the money correctly represented his intention at that time. The court also observed that the appellant's conduct (of aiding and abetting the bandits) during the second occasion on 27 October 1950 was relevant in indicating the appellant's earlier intention of giving the money to the bandits which would be prejudicial to public safety and public order. The court accordingly held that the above evidence tendered by the prosecution was relevant under Section 11 and 14 of the Evidence Ordinance. In another case of *Abu Bakar bin Ismail v. R*⁴⁴ it was also observed by the court that from the evidence of eight previous similar endorsements made by the appellant between 29 September and 29 October 1952 in which the appellant had each time filled in the forms necessary to apply for Singapore's driving licence without even inspecting the applicant's Federal driving licence as required by law, it was

⁴⁰ See *X v. PP* [1951] MLJ 10 (CA). See also illustration (k) of Section 14.

⁴¹ See *Mood Music Publishing Co. Ltd v. De Wolfe Ltd* [1976] 1 All ER 763, 766 (CA).

⁴² See *Re Soo Leo* [1956] MLJ 54, 56 (HC). See also Augustine Paul, *Evidence: Practice and procedure*, pg. 124.

⁴³ [1951] MLJ 10 (CA).

⁴⁴ [1954] MLJ 67 (HC).

“highly probable” that the appellant had, indeed, committed the two acts with which he was charged and that the appellant had committed the offences knowingly.

THE SCOPE AND APPLICATION OF SECTION 15 OF THE EVIDENCE ACT 1950

Section 15 of the Evidence Act gives yet another ground on which similar fact evidence may become relevant and admissible in a trial. According to section 15 of the Act, when there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that the act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.⁴⁵ Section 15 and 14 are actually related to one another and should be read together in the context of the principle relating to similar fact evidence. In fact, section 15 is actually an extension of the principle laid down in section 14 and while it could be said that section 14 is wider in its application, the scope of section 15 is, in contrast, a little bit narrower. This is because, besides having to prove facts regarding the existence of similar state of mind of the person (as required by section 14), section 15 also requires that such facts and evidence (aimed at proving the presence of knowledge or intention in the present charge) must form part of a series of similar occurrences.⁴⁶ As such, it must be shown under section 15 that there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact in order for it to form part of a series of similar occurrences. In fact, it must also be shown that there is a concurrence of common features in all similar acts of the accused.⁴⁷ The illustration below may further explain the situation in which an evidence of similar facts may be relevant and admissible for the purpose of proving the current intention or knowledge of the person in the present trial.

Illustration: A is accused of burning down his own house in order to obtain his insurance money. The fact that A lived in several houses successively, each of which he insured, in each of which fire occurred, and after each of which A received payment from different insurance companies, are relevant in proving the fire was intentional.⁴⁸

⁴⁵ See Section 15 of Evidence Act. See also Section 15 of the Indian Evidence Act as mentioned in Sudipto Sarkar & V R Manohar, *Sarkar on evidence*, pg. 337.

⁴⁶ Augustine Paul, *Evidence :Practice and procedure*, pgs. 122, 127, 128.

⁴⁷ Sudipto Sarkar & V R Manohar, *Sarkar on evidence*, pg. 339.

⁴⁸ See illustration (a) of Section 15.

There are precisely three requirements which have to be satisfied before evidence of similar facts is to become relevant and admissible under section 15 of the Evidence Act. The three requirements are:⁴⁹

1. There must be an issue as to whether an act was accidental or intentional or done with a particular knowledge or intention;
2. That issue must form part of a series of similar occurrences; and
3. In all those similar occurrences the person doing the act must have been concerned.

Looking at the three requirements which have to be fulfilled before an evidence of similar facts may become relevant and admissible in court, one can not help but notice the extreme necessity for the evidence of the other similar facts tendered to be of the same kind as the current fact in question. Indeed, Thompson J in *Rauf Hj. Ahmad v. Public Prosecutor*⁵⁰ stressed that (in addition to the above condition), the facts sought to proved must also be directly connected with the offence charged so much so that it forms part of the evidence upon which it is proved.

The case of *Wong Yew Ming v. Public Prosecutor*⁵¹ could perhaps throw some light on the application of section 15 of the Act. In this case the question of public interest was evaluated by court that is:

Whether in a trial in which an accused is charged for trafficking in respect of a particular quantity of dangerous drugs, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasions he had sold dangerous drugs, although such evidence is prejudicial to the accused.

In weighing the above issue, Hashim Yeop Sani CJ said the following:

In the context of the Act, PW8's evidence is in our view clearly admissible. The prosecution wanted to show that on previous occasions the applicants had sold drugs and therefore had been trafficking in drugs. In our law when the statutory amount of drug is proved to be in possession of any person the presumption is invoked and the person shall be presumed, until the contrary is proved, 'to be trafficking' in the said drug. PW8's evidence was relevant to show knowledge and that the possession of the drug by the applicant was not accidental... In this case, the evidence of PW8 is admissible not because it tends to show that a person committing one offence is likely to commit another but (the above-said evidence is admissible) to show knowledge or intention of the applicant and that the possession is not accidental. Accordingly the answer to the question posed must be in the affirmative.⁵²

⁴⁹ Augustine Paul, *Evidence: Practice and procedure*, pg. 138.

⁵⁰ [1950] MLJ 191, 192.

⁵¹ [1991] 1 MLJ 31 (SC).

⁵² *Ibid.*, pgs. 32, 33.

SIMILAR FACT EVIDENCE: A BRIEF OVERVIEW FROM THE PERSPECTIVE OF ISLAMIC LAW OF EVIDENCE

Having attained a brief comprehension of the scope and application of similar fact evidence under sections 11(b), 14 and 15 of the Evidence Act 1950, let us now examine the admissibility of such evidence in the eyes of Islamic Law of Evidence.

Eventhough the Syariah had long recognised the admissibility of sound ‘*bayyinah*’ (evidence) and concrete ‘*qarinah*’ (circumstantial evidence) in upholding one’s obligation or guilt, the very principle and application of similar fact evidence is itself new to Islamic Law of Evidence. In Malaysia, for instance, specific legal provisions pertaining to similar fact evidence were only drafted into the various states’ Syariah Evidence Enactments during the last ten years or so. The most prominent example of the recent inclusions of specific provisions on similar fact evidence in the states’ Syariah Evidence Enactments would be the Syariah Court Evidence (Federal Territories) Act 1997.⁵³ The three legal provisions included in this Act are section 11(b), section 14 and section 15. The above three sections read as follows:

Section 11(b) says:

Facts become *qarinah* (evidence) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.⁵⁴

Section 14, on the other hand, explains that:

Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are *qarinah* (evidence) when the existence of any such state of mind or body or bodily feeling is in issue or relevant.⁵⁵

Section 15, meanwhile, states:

When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is *qarinah*.⁵⁶

Hence, with the explicit inclusions of the above-mentioned provisions of sections 11(b), 14 and 15 in the Syariah Court Evidence (Federal Territories) Act 1997, it is now evident that the principle of similar fact evidence has officially

⁵³ Syariah Court Evidence (Federal Territories) Act 1997 (Act 561).

⁵⁴ Section 11(b), Syariah Court Evidence (Federal Territories) Act 1997.

⁵⁵ Section 14, Syariah Court Evidence (Federal Territories) Act 1997.

⁵⁶ Section 15, Syariah Court Evidence (Federal Territories) Act 1997.

been recognised by the Syariah and the Malaysian Islamic Judiciary, and such evidence of similar facts may now become admissible in the syariah court by virtue of it being a valid and admissible '*bayyinah*' (evidence) and '*qarinah*' (circumstantial evidence).

Since the wordings of the above three sections are almost identical to that of the wordings of sections 11(b), 14 and 15 of the Malaysian Evidence Act 1950, it would be extremely interesting to look into the extent of application of similar fact evidence in the syariah court. Would the application of similar fact evidence in the syariah court be similar to that of the application of such principle at the civil court, or would the principle be applied with some necessary modifications? Unfortunately, the answer to the above important question remains hazy and unclear as the whole issue is still shrouded with mystery. It is, thus, humbly suggested that a close study and scrutiny must now be conducted on the extent of the admissibility and application of similar fact evidence if evidence of such nature is to be tendered during trial at the syariah court.

On the other hand, inspite of the mist that has been descending all this while upon the issue of the manner and extent of application of similar fact evidence in the syariah court, one fact remains clear, that is: the question of its admissibility in the syariah court will primarily depend on the important issue of whether such evidence of a similar fact is tendered in corroboration with other more formidable evidence, or is it tendered as a sole evidence.

First of all, if the similar fact evidence is, *per se*, tendered as a sole evidence and in the absence of other stronger evidence, then it is submitted that evidence as such should not be admitted by the syariah court in both criminal as well as '*mal*' cases. This is because, generally speaking, there are mainly two standards of proof recognized and used in the syariah courts, the first being the degree of '*yakin*' and the second being the degree of '*zan al ghalib*'.⁵⁷ The standard of '*yakin*'⁵⁸ is generally required to be proven in criminal cases of '*hudud*' and '*qisas*'.⁵⁹ This signifies the meaning that the syariah court could only convict the accused of a criminal offence and sentence him to the harshest punishment if the prosecution has proven the accused's guilt 'beyond any doubt'.⁶⁰ On the contrary, the quantum of '*zan al ghalib*'⁶¹ is often required to be proven in syariah '*mal*' or civil cases.⁶² This accordingly means that the syariah court

⁵⁷ Mahmud Saedon, *An introduction to Islamic law of evidence*, Hizbi, Shah Alam, pgs. 17, 18.

⁵⁸ *Ibid.*, pgs. 15, 17, 18.

⁵⁹ Abdul Rahman Mustafa, *Prinsip undang-undang keterangan Islam: Satu pendekatan perbandingan*, Al Rahmaniah, Kuala Lumpur, 1988, pgs. 119-121.

⁶⁰ *Ibid.*, pg. 119.

⁶¹ Mahmud Saedon, *An Introduction to Islamic Law Of Evidence*, pgs. 16, 17.

⁶² Abdul Rahman Mustafa, *Prinsip undang-undang keterangan Islam: Satu pendekatan perbandingan*, pg. 122.

could only arrive at a particular judicial decision in a ‘mal’ or civil case if either party has established his facts and evidence on the degree of ‘strong probability’.⁶³ Looking at the above high standards of proof, it is hereby argued that the syariah court may not admit an evidence of a similar fact if such an evidence is tendered as a sole evidence in the absence of other more formidable and stronger evidence. This is due to the fact that such an evidence may be regarded as only a weak ‘*bayyinah*’ and ‘*qarinah*’, and is weak in its evidential value. In turn, such a weak evidence may not be able to achieve either the standard of ‘*yakin*’ or ‘*zan al ghalib*’ which have been mentioned above. The above submission and suggestion could well be substantiated with the following sources and arguments:

1. The Prophet (SAW) once said in one of His famous Traditions⁶⁴ which means:

Set aside hudud whenever doubt arises⁶⁵

In the light of the above Tradition, it is thus unwise and unsafe for the syariah court to admit an evidence of a similar fact *per se* in convicting and punishing an accused in a criminal trial as such an evidence, no matter how strong its probative value is, is still capable of casting some doubts on the guilt of the accused. This proves how fragile such sole similar fact evidence is. Indeed, in such a situation, benefit of the doubt should always be given to the accused and the presence of such doubt should, in turn, exclude the accused from being convicted and punished;

2. Article 4 of Mejjallatul Ahkam Al Adliyyah, mentions another famous Islamic Legal Maxim which bears the meaning:

Certainty will not be abolished by a doubt⁶⁶

The above legal maxim once again support our basic argument that such evidence of a similar fact *per se* should not be admitted by the syariah court either in criminal or civil cases due to its relatively weak evidential value. This is because, in accordance with the above legal maxim, the certainty of a person’s freedom from an obligation (in a civil case) or the certainty of the accused’s innocence (in a criminal case) could never be abolished or disproved by a mere doubt arising from such a weak evidence tendered by an adverse party in court.

⁶³ Mahmud Saedon, *An introduction to Islamic law of evidence*, pg. 17.

⁶⁴ See Paizah Hj Ismail, *Undang-undang jenayah Islam*, Dewan Bahasa Pustaka, Selangor, 1991, pg. 46.

⁶⁵ Shaukani, *Nailul Awtar*, Mustafa Al Babi al Halabi, Qahirah, pg. 110, as in Mahmud Saedon, *An introduction to Islamic law of evidence*, pg. 17.

⁶⁶ See Article 4, *Mejjallatul Ahkam Al Adliyyah*, in Mahmud Saedon, *An introduction to Islamic law evidence*, pg. 196.

3. Article 8 of *Mejjellatul Ahkam Al Adliyyah*, meanwhile, outlines another famous Islamic Legal Maxim which bears the meaning :

A person is presumed to be free from an obligation⁶⁷

This Legal Maxim further substantiates the above first argument when it emphasizes the fact that any person, including that of the accused in a criminal trial, should be presumed to be free from any obligation or guilt unless proven otherwise. Hence, one's obligation in a civil trial can only be proven on the degree of strong probability, and one's guilt in a criminal trial can only be proven on the degree of beyond any doubt. Therefore, in the light of such high requirements of standards of proof, it is hereby felt that an evidence of a similar fact, if tendered alone in the absence of other stronger evidence, is weak in its evidential value and may not be able to satisfy such high standards of proof above;

- iv) The final argument which tend to strengthen the above submission of inadmissibility of similar fact evidence, if it is tendered *per se* in the absence of other more concrete evidence, is actually found in the Words of Allah (SWT) in Surah Al Hujurat, verse 12 which bears the following meaning:

O ye who believe! Avoid suspicion as much (As possible): for suspicion In some cases is a sin...⁶⁸

From the above verse, it is clear that Almighty Allah has reminded the Muslims to avoid suspicion in their daily lives as suspicion or doubt could only lead to a sin. Hence, no one should ever be held responsible either in a civil or criminal case merely on the basis of a sole evidence of a similar fact which is so fragile in its evidential value for a simple reason that such a weak similar fact evidence, if tendered alone in the absence of other stronger evidence, is only capable of creating a doubt or suspicion and in no manner should a person be held responsible based on such suspicion or doubt. In fact, reliance on suspicion or doubt in the above case could lead to a sin as mentioned in the above verse as it is, of course, a sin to hold any innocent party responsible for any criminal or civil act.

Despite maintaining the above argument and submission of inadmissibility of similar fact evidence if tendered in the absence of other stronger evidence, this, nevertheless does not necessarily mean that the syariah court should ignore

⁶⁷ Article 8, *Mejjallatul Ahkam Al Adliyyah*, as in Mahmud Saedon, *An introduction to Islamic law of evidence*, pg. 196.

⁶⁸ Al Quran, Al Hujurat 49:12.

all evidence of a similar fact in its trials. In fact, it is hereby submitted that similar fact evidence may still become admissible in both criminal as well as civil trials if such an evidence is tendered simultaneously and together with other more formidable and stronger evidence. In this instance, if the syariah court is of the view that the evidence of a similar fact, tendered in a trial, supports and corroborates with other stronger evidence simultaneously tendered; then, such corroborative evidence of a similar fact may still become admissible to prove the accused's guilt or a party's civil obligation towards another. This is due to the fact that in the above situation, the corroborative similar fact evidence strengthens one's arguments and case as a whole and may be considered as a strong evidence (*'bayyinah'*) and a concrete circumstantial evidence (*'qarinah al zahirah'*) in proving the other party's guilt or civil obligation. The above argument is, indeed, in line with the opinions and arguments of the majority of the contemporary Islamic Jurists, particularly Ibn Taymiyyah and Ibn Qayyim from the Hanbali's School of Thought, who uphold the juristic view that one's civil obligation or criminal guilt may be established and proven in court by strong circumstantial evidence or *'qarinah al zahirah'*⁶⁹ which may, in turn, be seen as a formidable evidence or *'bayyinah'* in the eyes of the Syariah.

CONCLUSION

As far as the principle and application of similar fact evidence under the Malaysian Evidence Act 1950 is concerned, it has been observed that even though similar fact evidence is generally irrelevant and thus inadmissible; some exceptions have been made over the years to cater for its relevancy and admissibility. The Malaysian principle on the relevancy and admissibility of similar fact evidence has often been linked to the English case of *Makin v. AG for New South Wales*⁷⁰ and the principle in *Makin's case* was later on reformulated by the House of Lords in the English case of *Boardman v. DPP*.⁷¹ Indeed, the Malaysian courts, have often cited and considered both cases above when dealing with the question of admissibility of similar fact evidence in Malaysia. The local judges had, time and again, expressed their approval of application of the principle in *Boardman's case*, as reflected from the opinions and decisions given by Peh Swee Chin J and the Supreme Court in the cases of *PP v. Veeran Kutty*

⁶⁹ Ibn Qayyim, *Turuq Al Hukmiyyah*, Matba'ah al Ma'ani, Egypt, 1977, pgs. 6, 7; see also Abdul Karim Zaidan, *Nizam Al Qadha Fi Al Syariah Al Islamiah*, pgs. 219-223. The Islamic Jurists, in upholding the admissibility of 'Qarinah Al Zahirah' or 'Qarinah Al Qawiyah', as a basis for deciding a case, relied on, among others, Quranic verses of Yusuf, 12:18 and Yusuf, 12:25-28.

⁷⁰ [1894] AC 57.

⁷¹ [1975] AC 421; see also *DPP v. Boardman* [1974] 3 All ER 887 (HL).

& Anor⁷² and *Junaidi bin Abdullah v. Public Prosecutor*⁷³ respectively. Besides that, sections 11(b), 14 and 15 of the Malaysian Evidence Act 1950 have illustrated three grounds on which evidence of a similar fact may become relevant and admissible in various ways as we delved earlier on into a brief introductory discussion on the scope and application of each of these provisions.

Meanwhile, as regards to the position and admissibility of evidence of a similar fact in the syariah court, the very idea and principle is, indeed, still new and alien to the Islamic Judiciary and the syariah courts. In fact, even though specific legal provisions relating to similar fact evidence were included in the states' Syariah Evidence Enactments only recently, the extent of its application and admissibility in the syariah court remains unknown for now and a special study should now be conducted to look into this matter. However, regardless of the extent of its application, it is humbly felt that in the eyes of Islamic Law of Evidence, if such an evidence is to be tendered by any party in a syariah criminal or civil trial, the admissibility of such evidence will rest on the core issue of whether the sole evidence is tendered in the absence of any other evidence, or, is tendered in support or corroboration with other stronger and more formidable evidence. If, for instance, such evidence of similar fact is tendered in the absence of any other evidence, then it has been suggested that such a fragile '*bayyinah*' (evidence) and '*qarinah*' (circumstantial evidence) should not be admitted at all by the syariah court by virtue of its weaker evidential value and strength as well as its visible inability to fulfill the proof standard of either '*yakin*' (beyond any doubt) or even '*zan al ghalib*' (strong probability). On the other hand, if such similar fact evidence is tendered in the syariah court in corroboration with other more concrete evidence and, hence, strengthening the overall evidence adduced in court, then it has been suggested that such evidence of a similar fact may be admitted in the syariah court on the argument that such corroborative evidence serves as a strong '*bayyinah*' and a sound '*qarinah al zahirah*' as upheld by the majority of the Islamic Jurists from the four School of Thoughts.⁷⁴

Having said that, we may safely conclude that the principle of similar fact evidence as found in sections 11(b), 14 and 15 of the Malaysian Evidence Act 1950 has undoubtedly and uniquely become one of the many important tools of evidence in assisting the Malaysian courts of today to uphold justice and fairness in their respective judicial decisions. At the same time, it is also heartwarming to note that the principle of similar fact evidence has somewhat gained judicial recognition in the syariah courts in this country judging by the

⁷² [1990] 3 MLJ 498, 504; [1990] 2 CLJ 673, 680.

⁷³ [1993] 3 MLJ 217, 226-227.

⁷⁴ The admissibility of Qarinah Al Zahirah is upheld by the Maliki, particularly Ibn Taymiyyah and Ibn Qayyim, in reference to Yusuf, 12:18 and Yusuf, 12:25-28.

inclusion of specific legal provisions in the Syariah Evidence Enactments such as the Syariah Court Evidence (Federal Territories) Act 1997. What is more important now is to scrutinize the application of similar fact evidence in the Malaysian syariah courts closely in our effort of understanding the nature and extent of its application, and also ensuring its strict compliance with the general divine principles of Islamic Law of Evidence. Indeed, the adoption as well as adaptation of such principle in the Malaysian syariah court today may be seen as a wise and noble effort towards enriching the already enriched treasures of Islamic Law of Evidence and Islamic Judiciary.

ASP Mazupi Abdul Rahman
Pegawai Turus Pendakwaan & Undang-undang
Ibu Pejabat Polis
Kontijen Negeri Sembilan
70000 Negeri Sembilan Darul Khusus
Malaysia

Ahmad 'Azam Mohd Shariff
Faculty of Law
Universtiti Kebangsaan Malaysia
43600 UKM Bangi, Selangor D.E.
Malaysia