

Bewitchment As A Defence In Divorce Cases: An Analysis From Islamic Law Perspective

Mahyuddin Ismail, Abd Jalil Borham, Sharifah Intan Safina Syed Zubir
Universiti Malaysia Pahang, Malaysia.
mahyuddin@ump.edu.my, jalil@ump.edu.my, safina@ump.edu.my

Abstract

There are claims of the use of witchcraft in causing a rift in the relationship of husband and wife. This issue is raised in several marriage and divorce cases in Shari'ah Court in Malaysia, but there is no initiative taken to overcome it. The inexistence of such law makes the processes of consideration and evaluation of the truth of such claims difficult to be conducted. To this day, the issue is left unresolved. This paper aims to evaluate how far the claim that bewitchment can be a defense in divorce cases in Shari'ah Court in Malaysia. By referring to a few relevant cases, this study analyzes the perspective of Islamic law on the divorce cases connected to witchcraft; and how far it can be applied as a defense in a divorce case. The study is very important in helping the judiciary institution to be fair and to fight for the spouse who becomes a victim of witchcraft evilness.

Key words: Witchcraft, Divorce, Defense, Shari'ah Court

1. Introduction

Witchcraft is one of the most ancient knowledge and practices in the world. This practice involves the use of jinn and devil for a particular purpose. It is usually used to eliminate the feelings of love among family members, to cause divorce of a married couple, to make someone loses his mind, to cause disease to the extent that it could kill the victim without touching. Therefore, it is no surprise if a husband claims that he unconsciously and unintentionally divorced his wife, due to being witched. Allah SWT says:

"...And [yet] they learn from them (Harut and Marut) that by which they cause separation between a man and his wife..." (Al-Quran 2: 102)

In Malaysia, the issue of the use of witchcraft to cause a rift in marriage was raised in a few cases in Shari'ah Court, for example the case of *Mustafa Batcha v. Habeeba Abd. Rahman* [1410] JH 41, the

case of *Re Wan Norsuriya* [1418] JH 211 and the case of *Muhammad Kamran Babar Nazir Khan and Yani Yuhana Mohd Zambri* (Muhamaad Razis Ismail, 2011). Unfortunately, the issue was not addressed correctly due to absence of specific guidelines and laws related to witchcraft (Mahyuddin, 2012).

2. The Use of Witchcraft in Divorce

Referring to the above verse, Islamic scholars concur with the view that witchcraft is used to cause a rift in the relationship of married couples. Divorce cases related to the use of witchcraft usually occur in strange situations and are out of norm. From the writers' experience, there were few cases where the husband claimed that his tongue felt like it was overpowered by something that made him utter talaq towards the wife. Some claimed that they were not aware of the situation and could not remember when and where they uttered the talaq. There were also claims from husbands or wives that there were tremendous changes in their feelings for example intense dislike and hatred, whereby the feelings rose to the point where they would hit their spouses without them wanting it. The writers came across some cases where the wives became the ones who seriously insisted on a divorce without any reasons. Besides, there was a case where the wives applied for fasakh with the excuse of the husband being impotent when they were having intercourse even though he was not having the problem with his other wives.

In the case of *Mustafa Batcha v. Habeeba Abd. Rahman*, the appellant claimed that he uttered talaq in the condition where he was not even aware of his senses basically because he was affected by witchcraft. According to him, the witchcraft disturbance started after he got a canteen tender in a factory. Since then, his thoughts became disturbed and he felt hatred and anger towards his wife without any reasons. He also hit his wife even though he did not even realise what he was doing. In the condition where he was out of his mind, he made the application to divorce his wife. He, later on, found a strange package in white cloth at his canteen. He

sought treatment from a traditional treater and according to the treater, witchcraft was being done to him because he got the canteen tender. The doer felt jealous thus used witchcraft against him so that his marriage would be destroyed. After receiving the treatment and quitting the canteen, he recovered and was able to think back like a normal person. He, then, appealed to the court to reevaluate his 3-times divorce (*talaq*) which has been recorded by the court before that. The Court of Appeal's judge decided that the case was not heard thoroughly and ordered it to be heard again because of the failure of the Judge of Shari'ah Lower Court to get an expert opinion (*ra'yu al-khabīr*) regarding the issue. The learned judge suggested that the treater who treated him is called in to gain his expert opinion.

The above case was one of the cases involving witchcraft that was brought to court. In reality, there are hundreds (maybe thousands) of other similar cases encountered by witchcraft victims outside court. Based on the interviews conducted with a few judges of Shari'ah court in Kuantan and Kuala Terengganu, they believe that the use of witchcraft related to divorce cases really exists, and the judges have faced such cases (Mahyuddin, 2011). Due to the absence of guidelines and laws in the enactment regarding this issue, the judges took a safe route in judging such cases, which was basically based on what could be seen from the outside, besides using logic. Other than that, the judges looked at the side factors such as the background and the characteristics of the one who appealed before making any judgements. Hence, the exhortation by the learned judge in the case of *Mustafa Batcha* should be seen as pivotal for it addresses the importance of providing a specific guideline in the hearing of such cases in order to save marriages from witchcraft.

3. Syara' Law With Regards to Divorce Cases in Abnormal Case

Divorce issue specifically divorce by *talaq* is a sensitive issue and needs to be handled carefully and with discretion. It is something that can occur either with or without a serious intention. Prophet Muhammad SAW said as narrated by Ibn-Majah, Abu Dawood and Tirmizi: "Three things which its reality is reality and its joke its reality. They are: Marriage, Divorce and Freeing of a slave."

Hence, Islamic scholars are very careful in discussing the issues of divorce by *talaq*. Syeikh Abi Bakr Usman (1995) stated that there are a few conditions which have to be present in order for a *talaq* utterance to be considered valid. The conditions are husband, wife, *sighah*, *qasad talaq* and the

husband's power. Husband's power means the desire to divorce in his heart accompanied by a sane mind. Therefore, a *talaq* is invalid if uttered by a husband in a condition where his mind is not completely sane or when his desire is controlled by someone or something. This is in parallel with the saying of the Prophet Muhammad SAW as quoted by Imam Ahmad (1995) and Abu Dawood (1952): "Divorce and manumission do not count in case of *Ighlaq*." Imam Ahmad said *Ighlaq* means anger whilst some other scholars interpreted it as doing something under force and others said it stands for insanity.

Syeikh Abdul Rahman Al-Jaziri (1987) stated: "there are certain conditions of divorce (*talaq*), one of them is sanity. *Talaq* is invalid if the husband is lunatic (possessed) even if the intermittent madness comes for a moment and then disappears. It means, if he utters *talaq* while he is insane, then the *talaq* is not taken into account. Insanity (*junun*) refers to anyone who loses his mind due to severe pain, fever, headaches that come after." The same opinion is shared by Imam As-Shāfi'ī, Imam Al-Mawardi and Dr. Wahbah al-Zuhaili.

Islamic scholars are indeed united in stating that a *talaq* uttered by someone who is not in his perfect sense or is influenced by something by which he could not control himself, is not valid. Based on the writers' experience and the experience of those who were involved in treating witchcraft victims, the condition of not being in perfect sense and out of control are normally suffered by the victims of witchcraft. Moreover, it also affects the victims emotionally and physically in career, in relationships with people, not to mention in the victims' homes and business areas (Mahyuddin, 2011). Normally, the victims will experience intense and severe depression, disturbance, hatred, anger, despisal and sadness. Sometimes the victims hear whispers that induce them to divorce their wives or see visuals of their spouse having affairs that then will cause their extreme anger towards the spouse.

The Prophet Muhammad P.B.U.H. was a victim of witchcraft whereby at that time he felt like as if he was spending the night at one of his wives' houses but he did not do it. This incident which was written in Sahih Al-Bukhari and Sahih Muslim, shows the capability of the witchcraft practitioner to control the mind and the desire of the victim especially in the issues related to marriage. Magic that separates or causes hatred is used to part a married couple for some particular reasons which normally are linked to personal problems, jealousy, revenge, sabotage and others (Amran Kasimin, 2002). As a result, the feeling of hatred, fights, doubts towards the spouse, anger without any cause, restlessness when being together, the desire to divorce and the feeling that the

spouse's face and appearance are ugly and disgusting exist (Wahid, A.B. S & Daud, M.S, 1994). There are witchcraft practitioners who use items taken from clawed animals such as cat's and dog's bones that are worshipped, and then buried under the victim's house or placed on the roof. In the end, the peaceful life of the victim and the spouse is shattered and they would always fight like cat and dog.

In the book of *Fatāwa wa ishtishārāt al-Islām al-Yaum*, chapter 11, page 358, it is stated:

“As to those who are magically enchanted which lead to loss of consciousness and sanity, causing him to say what he does not want, then his utterance of talaq did not take place based on the hadith of the Prophet: " Divorce and manumission do not count in case of *Ighlaq*.”

This view is in parallel with Syeikhul Islam Ibnu Taimiyyah's view in kitab *Mukhtasar Al-Fatawa Al-Misriyyah* page 544 which stated: "...and anyone who was enchanted to the point he did not realize what he said, then the talaq pronounced does not take place. While if the magic does not cause changes on his sanity and consciousness, e.g. magic to stop him from having sex only, then the talaq is valid.”

The former President of the Islamic University of Medina, Syeikh Abdul Muhsin Ibn Hamd Al-^cAbbād was asked regarding the punishment for someone who commits a crime in the condition where he is possessed or being posed by witchcraft. He answered: "If he is guilty of the offense in the unbalanced state of mind, he would not be punished, whereas if he had committed the offense while his mind is sane, the sentence will be imposed on him despite his pain, depression and discomfort. The only thing that just gives him a relief is insanity. "

Therefore, it can be concluded that if a husband utters a talaq in the condition where he is not in his normal sense due to being a victim of witchcraft, the talaq is considered as not valid. Anyone who performs an action in the condition out of sense (*ghair ^cāqil*) will not bear any consequence of the action based on the Prophet SAW's hadith narrated by Aisyah r.a.: “The pen is lifted from three people: A person sleeping until he wakes up; an insane person until he regains sanity; and a child until he reaches the age of puberty.” (Bukhari & Muslim)

Meanwhile, there are cases of fasakh filings which are filed due to injuries and physical incapacity that are suffered by the spouse such as leprosy, vitiligo or scabies which are difficult to be cured, *ratqa* (vagina is covered by flesh), *qarna* (vagina is covered by bones) and *^cunnah* (impotency for male). In fact, some cases of sexual dysfunction, erectile dysfunction and impotency which are suffered by males can be caused by witchcraft (Amran Kasimin, 1995). In Malaysia, there are two types of witchcraft

that are normally used for these purposes, namely *sihir batang keladi* (refers to a type of black magic ritual using taro or yam) and *sihir jerutan* (refers to a type of black magic ritual using tie or rope). According to Walter Farber (1995), these types of witchcraft have been practiced ever since the Mesopotamian civilization and they are around until today. The use of such witchcraft are also reported quite often in the Europe around the 15th century (Richard Kieckhefer, 1990). *Santau* (refers to a popular type of Malay black magic to kill someone) which is produced from items that cause itchiness and are venomous (such as bamboo prickles, bamboo shoots, caterpillar) can cause scabies on the victim's body with foul smell (Jahid Sidek, 2006), whereby the body will feel pain as if it is being poked by a sharp object and the feeling of stings (Amran Kasimin, 2002). When any couple reports that the cause of incapacity or physical injury suffered is believed due to witchcraft based on common signs, the court needs to give the chance to the victim to defend himself.

4. Burden of Proof for 'Bewitchment' as a Defence

The experience of witnessing the cases of broken couples due to witchcraft has sparked an idea that a legal mechanism should be established. It would give an opportunity for the victims to defend and fight for their marriages with the belief that their spouses are 'bewitched'.

To apply the defend of bewitchment, it is suggested that the burden of proof is as follow. If:

- a) a husband claims that the talaq is uttered in the condition where he is under the influence of witchcraft; or,
- b) a wife claims that her husband uttered the talaq in the condition where he is under the influence of witchcraft;

he or she, who claims such thing should prove to the court that:

- i). there are signs and 'common symptoms of bewitchment' shown by the spouse;
- ii). the husband is suffering from insanity due to witchcraft when he is uttering talaq.
- iii). the magic imposed on the spouse does affect his thinking ability.

Therefore, if a husband claims that he divorced his wife in the condition where he was not in his perfect sense due to bewitchment, the burden of proof is on him to show that there are 'common symptoms of bewitchment' suffered by him that truly caused him to lose his sanity. However, if a wife claims that her

husband divorced her in the condition where he was not in his perfect sense due to bewitchment, the burden of proof is on her to prove that her husband suffered the common symptoms of bewitchment whereby the magic truly caused the husband to lose his sanity. In terms of divorce appeal cases by fasakh for the reasons that only involve physical elements without affecting the victim's mental condition (such as leprosy, vitiligo or scabies, *ratqa*, *qarna* and *'unnah*), the spouse who believes that the adversities happened due to witchcraft, needs to prove to the court that:

- a) There is physical injury or incapacity;
- b) There are common symptoms of witchcraft which are linked to the injury or incapacity;
- c) The injury or the incapacity becomes the reason for the spouse to appeal for fasakh.

If it is successfully proven, the court should release an order for the victim or his spouse to get the treatment for the influence of witchcraft within a certain period before the case is being heard again.

5. Expert's Opinion in Identifying 'Common Symptoms of Bewitchment'

The victims of witchcraft normally experience particular symptoms which can be classified as 'common symptoms of bewitchment' (Mahyuddin Ismail, 2011). To evaluate whether the symptoms claimed are due to witchcraft, the opinions of the experts who understand the area and the practice of witchcraft need to be sought. This issue has already been discussed by Islamic scholars. According to Al-Khatib As Syarbini (1978), a person who used to be famous as a witchcraft practitioner, but has repented from practising witchcraft can be considered as the witness who can provide statements in regards to witchcraft. Therefore, any individual who has a wide experience and is recognised by the community as an Islamic medicinal expert can be considered as the one who is reliable to give opinions. It depends on the judge whether to sustain or overrule the statement. The need of expert opinion on this matter has been stated by the Judge of Court of Appeal in the case of *Mustafa Batcha vs Habeeba Abd Rahman*:

"The learned judge did not record any of the facts from the case and he also did not summon the healer who treated the appellant to get statements in order to ensure that the appellant was really sick due to witchcraft which caused the divorce."

Hence, if any spouse in a divorce case claims that there is the use of witchcraft to destroy the marriage, the court can seek the opinion of an expert (which is assigned by the court or the prosecutor) to identify and confirm the matter, as below:

- a) Is it true the symptoms experienced by the victim are due to witchcraft, or they are just symptoms of disturbance by spirit which is due to *saka* (a belief in Malay people that jinn may be inherited from the ascendants), the practice of mystical and superstitious ritual, a misleading traditional treatment or others;
- b) How far is the witchcraft used affecting the mental and physical conditions of the victims;
- c) Is there a correlation and link between the symptoms, witchcraft item (if there is any) and the effects towards the victim;
- d) Is there circumstantial evidence (*qarinah*) that can be linked to the claim made;
- e) And other related matters.

Such methodology is suitable according to the provision in section 33 of the Shari'ah Court Evidence Enactment of the states in Malaysia which gives the power to the court to summon an expert in any science or art to give opinion in court.

If the judge (after scrutinising and hearing the expert's opinion about the matter) has any reasons to believe that the person who claims the matter is really experiencing the symptoms of bewitchment, he can release an order to have the person be referred to any reliable treatment centers and to give the person an adequate time to get the treatment. The main purpose of the treatment is to ensure the fully recovery of the victim from the influence of witchcraft, thus then the victim can be tried in court in a perfectly sane condition. Normally, when a victim is free from witchcraft, he will be able to rationally consider the action that has been taken. In this condition, therefore, the court can have a rehearing about the appeal filed by either the victim or the spouse. This method is fairer because all parties in the appeal or application are being of sound mind.

6. Conclusion

As a conclusion, the use of witchcraft in causing divorce really happens and the issue has been raised in a few cases in Shari'ah Court. Muslim scholars do agree that a divorce which is caused by witchcraft is not valid. Therefore, this issue needs to be scrutinised and discussed in detail so that it will provide guidelines for judges to evaluate the divorce cases that are connected to witchcraft. It is worried that if judges do not understand this issue thoroughly, mistakes in judgment may occur. The scrutiny on this issue does not only provide fairness to married couples, but it brings back the unity and harmony in their marriage. After all, it is worth noting that this paper work highlights one of the ways to defend the victims' spouses who are divorced due to witchcraft.

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