



Sentencing of Jarimah in An Unproven Indictment (Analysis of Judgment No. 15/JN/2022/Ms.Bna)

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Abstract

Aceh Qanun Number 6 of 2014 concerning Jinayat Law (hereinafter abbreviated as QHJ) formulates in general ten jarimah. The ten jarimahs consist of Khamar, Maisir, khalwat, Ikhtilath, Zina, Sexual Abuse, Rape, Qadzaf, Liwath, and Musahaqah. Article 191 paragraph (1) of the Indonesian Code of Criminal Procedure (KUHAP) says that if the court is of the opinion that from the results of the examination at the trial, the guilt of the accused for the acts charged against him is not legally and convincingly proven, then the defendant is acquitted. Furthermore, Article 191 paragraph 2 says if the court is of the opinion that the act charged against the defendant is proven, but the act does not constitute a criminal offense, then the defendant is discharged from all lawsuits. The consequences of the provisions of Article 191 paragraph (1) and paragraph (2) above show two things, namely: first, if found guilty according to the procedural law stipulated in the procedural law, then the accused can be found guilty. Second, if it turns out that after examination it turns out that what was done by the defendant was not proven, then the legal consequence is that the defendant must be released. Both provisions do not regulate if the alleged network is not proven, this can be seen in decision Number 15/JN/2022/MS. BNA, which in the verdict was charged with the primary charge and the subsidiary charge. The primary charge of the accused was charged with rape as stipulated in the Qanun of Jinayat Law. Then in the subsidiary indictment where the examination and imposition of 'uqubat on jinayat cases in the Shar'iyah Court must be based on the charges filed by the public prosecutor. Empirical facts show that there was a judge's decision that handed down 'uqubat outside of the charges and demands from the JPU as contained in decision number 15/JN/2022/MS. BNA. The research method used to analyze the problems in this study is the normative legal research method. The primary legal materials used are Qanun Hukum Jinayat, Qanun Hukum procedural Jinayat, Code of Criminal Procedure and judge's decision Number 15/JN/2022/MS. BNA. The approach used is the case approach, the statutory approach and the conceptual approach. Data analysis was carried out prescriptively by assessing whether or not the application of the law in decision Number 15/JN/2022/MS was appropriate. BNA. The results showed that the sentencing of charges that were not proven according to the jinayat procedural law evidentiary mechanism was not appropriate in the context of law enforcement. The legal consequence that arises if the charges are not proven is that the defendant must be acquitted of sentencing. The basis for the judge's extra-indictment was because the defendant at trial had admitted to committing adultery with the victim's child, although the JPU at the trial did not charge him with adultery. In addition, the judge used Jurisprudence No. 675K/Pid/1987 as the basis for sentencing, which allowed the judge to impose a lighter sentence than the charges filed by the JPU. Decision Number 15/JN/2022/MS. BNA from the perspective of legal certainty and justice is not accommodated in it, so it tends to be detrimental to the accused.

Keywords: *Jinayat; Sexual Harassment; Ultra Petita; Adultery*

Introduction

Aceh Qanun Number 6 of 2014 concerning Jinayat Law (hereinafter abbreviated as QHJ) formulates in general ten jarimah. The ten jarimahs consist of Khamar, Maisir; khalwat; Ikhtilath; Adultery; Sexual harassment; Rape; Qadzaf; Liwath; and Musahaqah. The ten jarimahs become material laws that are used as legal bases by judges in the Shar'iyah Court. The material law is used by law enforcers other than judges, namely the Public Prosecutor and also investigators in the Police.

The use of material law by JPU as an effort to enforce the rule of law against a person who is strongly suspected based on evidence that shows he is the perpetrator. The JPU uses QHJ when filing charges with the Shar'iyah Court as a basis for prosecuting a person suspected of performing jarimah as stipulated by the qanun. Indictment is a very important part of the process of solving cases in the Shar'iyah Court, as in the criminal justice system in general. An indictment is an official statement containing the charges against the accused, filed by the Public Prosecutor. An indictment is a letter or deed containing the formulation of the criminal act charged against the defendant which is concluded and withdrawn from the results of the investigation examination and is the basis and basis for the judge in the examination before the court session.

Article 191 paragraph (1) of the Indonesian Code of Criminal Procedure (KUHAP) says that if the court is of the opinion that from the results of the examination at the trial, the guilt of the accused for the acts charged against him is not legally and convincingly proven, then the defendant is acquitted. Furthermore, Article 191 paragraph 2 says if the court is of the opinion that the act charged against the defendant is proven, but the act does not constitute a criminal offense, then the defendant is discharged from all lawsuits. This confirms that judges in making decisions must be based on sufficient and convincing evidence.

The Qanun of the Jinayat Procedural Law also regulates the same in the context of sentencing the perpetrators of the jarimah as stipulated in the Qanun. This is affirmed in Article 191 paragraph 2 of Aceh Qanun Number 7 of 2013 concerning Jinayat Law which says that if the Judge is of the opinion that from the results of the examination at the trial, the guilt of the Defendant for the acts charged against him is not legally and convincingly proven, then the Defendant is acquitted. That is, a defendant who is not legally proven and convinced to commit jarimah, then must be released, that is, the defendant is pure free. Conversely, if indeed found guilty, it means that the accused can be brought down with 'uqubat. This is affirmed in Article 191 paragraph (1) of the Jinayat Procedural Law Qanun which says if the Judge is of the opinion that from the results of the examination at the Court hearing, the guilt of the Accused for the acts charged against him is validly and convincingly proven, then the Accused is sentenced to 'Uqubat.

Although de jure as described above, the judge must decide the case based on the charges filed by the JPU, empirical facts show that the judge's decision is different from the indictment. This can be seen in decision Number 15/JN/2022/MS. BNA, which in the verdict was charged with the primary charge and the subsidiary charge. The judge considered that the jarimah committed by the defendant was an adulterous jarimah whose penalty was hudud 100 times. The problem is that the JPU did not specify adultery in its indictment, so even in the trial it was not proven by the JPU that the finger committed by the defendant was adultery. The judges' consideration by choosing the zina jarimah proven at the trial and in its consideration in decision Number 15/JN/2022/MS. BNA

The principle adopted in the Qanun of the Jinayat Procedural Law is that judges are prohibited from deciding cases outside the charges filed by the public prosecutor. This is affirmed in Article 178 paragraph 4 which states that Deliberation as referred to in paragraph (3) must be based on the indictment and everything that becomes a fact in the examination at the trial. This provision is concrete evidence that must be used as a basis by the panel of judges in sentencing them. Deliberation conducted by the judge should not be out of the indictment and anything proven at trial.

Research Results and Discussion

a. Sentencing of Jarimah Law in Unproven Indictment (Analysis of Decision Number 15/JN/2022/Ms.Bna)

The sentence against the defendant in decision Number 15/JN/2022/MS. BNA is not in accordance with the provisions of jinayat procedural law. The Jinayat Procedural Law governs, in principle, the basis on which the judge considers the verdict is the indictment filed by the Public Prosecutor. If the charges are not proven, the juridical consequence is that the defendant must be acquitted of all charges. This is also stipulated in Article 191 paragraph 2 of Aceh Qanun Number 7 of 2013 concerning Jinayat Procedural Law which says that if the Judge is of the opinion that from the results of the examination at the trial, the guilt of the Defendant for the acts charged against him is not legally and convincingly proven, then the Defendant is acquitted.

In addition, based on the provisions of Article 178 paragraph (4) QHAJ states that deliberation as referred to in paragraph (3) must be based on the indictment and everything that becomes fact in the examination at the trial. Article 178 paragraph (4) of QHAJ emphasizes that in the process of deliberation of judges, decisions must be based on a solid basis, namely an indictment that establishes a formal charge against the accused, as well as facts that arise during the trial that constitute evidence that supports or refutes the accusation. It is important to ensure that decisions taken by judges are based on a solid legal foundation and a fair trial process.

Decision Number 15/JN/2022/MS. BNA can be said to be an *ultra petita* verdict, because the judge has handed down a verdict on a case that was not prosecuted or exceeded what was requested in the indictment. In the context of criminal procedural law, this can be caused by several factors, one of which is that the charges filed by the Public Prosecutor are considered imperfect or inadequate in proving all charges against the accused. Such a sentence can be used as a basis for the Defendant to file an appeal as a form of resistance to the verdict in the first instance. Judges have an obligation to ensure that judgments are based on valid evidence and due process. If the award is considered to be *ultra petita* or not in accordance with the law, then there are legal mechanisms such as appeals or cassation that can be used to raise objections and request review of the decision.

If there is a discrepancy between the charges brought by the public prosecutor and the evidence presented at trial, the judge may consider that the charges are not proven and may exonerate the accused of rape and sexual abuse. An interesting thing is also to be analyzed in decision Number 15/JN/2022/MS. BNA is the use of the legal basis of jurisprudence as the basis for imposing sentences outside the charges submitted by the Public Prosecutor. Jurisprudence is the decision of previous judges who have the same subject matter with the decisions of other judges. Usually this jurisprudence is used as by other judges in trying and deciding the same case in the future. Jurisprudence on which the panel of judges is based

This is because the guilt of the accused no longer needs to be investigated and re-investigated against the Law of Jarimah zina by investigators. The investigator is obliged to re-investigate the case with the jarimah zina, then the JPU file a re-charge against the defendant by accusing him of committing jarimah zina. The process certainly takes a long time to be processed again from the beginning. The essence of the judge's decision using jurisprudence Number 675 K / Pid / 1987 in imposing 'uqubat on decision Number 15 / JN / 2022 / MS. BNA is more time efficient, because there is no need to repeat the criminal law enforcement process using the *criminal justice system* from the beginning. The evidence carried out by the JPU is not in accordance with the proof of adultery, because it cannot be presented by four witnesses at once who saw the incident firsthand. However, based on the facts revealed at the trial, the panel of judges concluded that adultery with children had occurred, resulting in a sentence of 100 lashes and 24 months in prison. Imprisonment in such cases for adultery committed with a child as referred to in Article 34 QHJ which can be added with additional ta'zir in addition to hudud punishment. From the perspective of mashlahah, the judge's decision Number 15/JN/2022/MS. BNA has complied

with the principle of the purpose of Islamic law, which is to preserve offspring so that it is appropriate to be imposed with hudud punishment. The defendant who has been sentenced with hudud in the world has escaped his sentence in the afterlife, because he has finished living it in the world.

The pattern carried out by the panel of judges in handing down decision Number 15/JN/2022/MS. BNA is to set aside the primary indictment and subsidair charges filed by the JPU. The primary charge filed by the JPU is the finger committed by the accused in the form of rape. Then the subsidiary charge was a finger of sexual harassment. Both fingers showed that none of them could be proven at trial. The panel of judges considered that what was proven was that the defendant had committed adultery against the victim's child. Although the JPU did not actually charge the accused with committing adultery, but because it had been proven to have committed adultery according to the panel of judges, it was imposed with 'uqubat hudud against the defendant.

b. Research Solution on Sentencing of Jarimah Law in Unproven Indictment (Analysis of Decision Number 15/JN/2022/Ms.Bna)

The verdict that decides beyond the charges demanded by the public prosecutor is interestingly also analyzed in the perspective of *maqashid sharia*, which is the purpose of the creation of Islamic law. The purpose of establishing Islamic law, as accommodated in *maqashid syariah* (the purposes of sharia), is to realize a sustainable, harmonious and just human life. The concept of *maqashid sharia* emphasizes the main objective of Islamic law which includes the protection of five main aspects of human life, namely: *hifz al-din* (religious protection). Second, *hifz al-nafs* (protection of the soul). Third, *hifz al-nasl* (protection of offspring) is to maintain the continuity and continuity of offspring and ensure the protection of family rights, including the rights of women and children. Fourth, *Hifz al-mal* (Protection of Property) and Fifth, *Hifz al-'Aql* (Protection of Reason) i.e. protection of human reason.

Overall, the judges' deliberations in the above judgment show that the charges postulated by the JPU are not proven. Both the primary charge is rape and the subsidiary charge is sexual harassment. The panel of judges judged that based on the examination at the trial it was proven that the act committed by the accused was adultery, so it was imposed under the law contained in Article 34 QHJ which threatens 100 lashes plus an additional sentence of 24 months imprisonment. The consideration is the Supreme Court Jurisprudence Number: 675K / Pid / 1987 which in principle regulates if the charges charged are not proven and the proven crime turns out to be lower in sentence, then the accused can be blamed for committing a lighter criminal offense.

The judge who ruled in the case 15/JN/2022/MS. BNA which of course must provide the values of justice, expediency and legal certainty. These three aspects are the basis of legal objectives that should be accepted by the community, which in the context of the verdict is the accused and the victim. The defendant, even though it is strongly suspected based on the available evidence, he is the person who committed the crime, must still prioritize the principle of presumption innocent or the principle of presumption of innocence. That is, the treatment given to him must be treated as an innocent person with due regard to the principles of human values and respect. This provision is a legal instrument that must be followed and carried out by law enforcement, because a person who is processed legally must be treated in accordance with applicable legal rules. Referring to the provisions of Article 191 paragraph 2 Qanun of the Jinayat Procedural Law, it can be categorized as acts committed by there can be considered unproven. The consequence of unproven jarimah actions is that they must be exempt from all charges because the rule of law so requires.

The act of seeking alternatives by using other provisions as a basis for sentencing the accused is not appropriate according to law. Moreover, it is imposed with adultery which is actually the threat of hudud punishment. An important principle in law is that it is better for a thousand guilty people to escape than for one innocent person to be punished. This principle emphasizes the importance of justice and protection of the rights of innocent individuals from unjust punishment. Normatively, there is some

independence given to the judges of the Shar'iyah Court in handing down decisions, namely the ability to impose sentences that are different from those demanded by the JPU. This is as affirmed in Article 178 paragraphs (6) and (7) of QHAJ which says 'The Uqubat to be imposed may be less or more than the amount submitted by the public prosecutor in the 'Uqubat prosecution. The panel of judges may impose a different type of punishment than that requested by the public prosecutor if the 'uqubat jarimah is alternative. Based on this provision, it is understood that the panel of judges may be able to impose a higher or lower sentence than the charges filed by the JPU.

In addition, based on the provisions contained in Article 178 paragraph (8) above, it is also seen that the panel of judges can impose a different 'uqubat between the one submitted by the public prosecutor and the 'uqubat handed down in the decision. This is the freedom of judges in making decisions by choosing in accordance with the values of justice and benefit for perpetrators and victims. The different punishment here is because generally the 'uqubat stipulated in each jarimah is alternative, except for the jarimah which is hudud. Thus, in jarimahs such as khamar, zina and qadzaf the threat of punishment is hudud. Legal certainty and justice are two things that should be obtained by defendants in the law enforcement process, because they can guarantee the realization of human rights. In order to realize these two aspects, one thing that should be considered in the future is to evaluate the provisions of Article 178 paragraph (4) QHAJ. Correction of these provisions is important to ensure legal certainty and legal justice for defendants. The form of correction to the provision is to give space to the judge to sentence the perpetrator on the finger proven at trial, even though it is not proven against the charges alleged at trial. The revision of these provisions in the context of jinayat law enforcement according to the author is very relevant, because the networks of sexual harassment, adultery, khalwat and ikhtilath are almost close together. Sometimes the JPU in the trial postulated sexual harassment, but between the couple both liked each other and were found in a hotel. The existence of the provisions of Article 178 paragraph (4) QHAJ causes judges to become more rigid and the realization of speedy trials and light costs. If the judge refers to these provisions, it results in the length of the law enforcement process. This is because if indeed the charges filed are not proven, while the other fingers are proven as contained in the verdict proven, then the judge must acquit the accused. Because in principle, the provisions of Article 178 paragraph (4) only allow judges to decide sentences based on the charges filed. As a result, the case had to be re-investigated by the police using zina jarimah, resulting in a longer time needed.

Conclusion

The imposition of 'uqubat against unproven defendants based on allegations submitted by the JPU to the trial is not appropriate in the perspective of law and the rule of law. Such law enforcement causes human rights violations because the law enforcement process is not based on applicable laws and regulations. An important principle of law enforcement in the context of the rule of law is that it must place the rule of law as the commander so that existing laws can provide justice for the community by upholding human rights. The different sentences between the charges filed by the JPU and the 'uqubat imposed by the judge are contrary to the applicable law. As a result, this action can violate human rights for the accused because the punishment is not according to the procedures and legal provisions stipulated in the laws and regulations.

The basis for the judge to impose a different sentence from the indictment is Jurisprudence Number 675K/Pid/1987 as the basis for sentencing, which allows the judge to impose a lighter sentence than the charges filed by the JPU. In addition, the judge also judged based on the facts at the trial that showed the perpetrator's actions were proven to have committed adultery because he had confessed at the trial.

The imposition of a sentence that is different from the JPU charge creates uncertainty of law and justice in the midst of society. Especially for defendants who are convicted not on the basis of applicable

law, which in this case is not in accordance with the Qanun of the Jinayat Procedural Law. The rule of law should be enforced as stipulated in the Jinayat Law Qanun so that legal certainty can be realized for the accused and other communities. From the perspective of maqashid shari'ah which is the main orientation of Islamic law to nurture offspring, the ruling can be said to have been correct. The fact of the trial is inevitable that the practice of adultery has occurred between the accused and the child, although according to the law of proof the adultery finger is not appropriate according to QHJ. The facts of the trial did show that the defendant said that he had conjugal relations with the victim's child.

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