

Analysis of Islamic Criminal Law on the Acquittal of Khalwat Perpetrators (Study Of Verdict Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna)

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Abstract: *This study aims to evaluate the mindset of the Banda Aceh MS Panel of Judges in deciding the case of acquittal against the defendant in the khalwat case, as stipulated in Qanun Aceh Number 6 of 2014. The method used is a normative juridical approach with case studies on two decisions, namely Decision Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna. The findings in this study show that the Panel of Judges adheres to the principle of In Dubio Pro Reo, the principle of Unus Testis Nullus Testis, as well as the principles of Tabayyun and Tasabbut. However, the application of the principle of Unus Testis Nullus Testis is considered inappropriate, because although the Assembly stated that there was only one witness, in fact the Public Prosecutor presented three witnesses. In addition, the application of the principle of In Dubio Pro Reo gives the impression that there are doubts from the Panel of Judges in assessing the case, even though based on the facts of the trial, the element of intentionality is not clearly and decisively proven. Thus, the use of such principles is considered irrelevant. The element of intentionality and the existence of two valid pieces of evidence cannot be proven, so the indictment is declared not to meet the requirements of proof according to the law..*

Keywords: *Unus Testis Nullus testis; In Dubio Pro Reo; khalwat; acquittal; Qanun Aceh; MS*

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INTRODUCTION

The legal system in Indonesia initially adopted the Continental European legal system which was introduced through Dutch colonialism. However, as time goes by and the awareness and thinking of the Indonesian people develops, the national legal system begins to experience the influence of various other legal systems. This development is

inseparable from the existence of values that live and develop in society, such as customary norms and the principles of Islamic teachings.¹

The influence of Islamic law on legislation in Indonesia began to be evident since the beginning of the 20th century. Initially, the application of Islamic law often faced clashes with local traditions that

¹ Endang Sumiarni dan E. Sundari, *Politik Hukum dan Tata Hukum Indonesia*, (Yogyakarta, Cahaya Atma Pustaka, 2015), 35.

developed in the community. However, thanks to the belief in the principles of Islamic law which is *rahmatan lil 'alamin*, its application has become easier to accept and carry out in social life, especially among Muslims in Indonesia.²

The term "Islamic Law" is not explicitly found in the Qur'an nor in the classical literature of Islamic law. In the Qur'an, what is known are terms such as *sharia*, *fiqh*, and *jinayah*. The concept of benefit in Islamic law includes the protection of five main aspects, namely religion, intellect, soul, property, and heredity.³

In his book entitled *Islamic Criminal Law*, Prof. Dr. Mardani explained that in Arabic, Islamic criminal law is known as *jarimah* or *jinayah*. Etymologically, the word *jarimah* comes from *jarama-yajrimu-jarimatan* which means "to do" or "to cut". The term is then specifically used to refer to a sinful act or an act that is hateful. In addition, *jarimah* can also be derived from the word *ajrama-yujrimu*, which means "doing something that is contrary to truth, justice, and deviating from the right path."⁴

Furthermore, etymologically, the term *jinayah* comes from the word *jana-yajni-jinayatan*, which has the meaning of committing a sinful act.⁵ Terminologically, *jinayah* is defined as an act that is prohibited

by *the sharia*, whether it causes harm to life, property, or other things.⁶

The discussion of the scope of *jinayah* law can be explained as a branch of science that examines various types of rules stipulated in the Qur'an and the hadith of the Prophet PBUH, both commands and prohibitions. The law also includes provisions regarding sanctions or punishments imposed on individuals who violate these provisions, especially those related to criminal acts.⁷

Islamic Criminal Law covers various types of criminal offenses, including theft, adultery (including homosexuals and lesbians), accusations of adultery without evidence against a respectable person (*qadzaf*), consumption of intoxicating beverages (*khamar*), acts of murder or persecution, destruction of other people's property, and acts that cause chaos and security disturbances. All of these actions are within the scope of Islamic criminal law.⁸

According to Prof. Dr. H. Zainuddin Ali, M.A. in his book *Islamic Criminal Law*, adultery is defined as a sexual relationship between a man and a woman who do not have a valid marriage bond between the two.⁹ According to Dr. Mardani, in terms of *zina* it explains that there are 6 (six) scholars who define adultery, namely Maliki "the intercourse of a *mukallaf* in a human *vagina* that does not belong to him", Shafi'i "inserts

² Abdul Ghoni Abdullah, *Pengantar Kompilasi Hukum Islam Dalam Tata Hukum Indonesia*, (Jakarta, Gema Insani Press, 1994), 26.

³ Lihat: Bakhtiar Efendi, *Islam dan Negara: Transformasi Pemikiran dan Praktik Politik Islam di Indonesia*, (Jakarta: Paramadina, 1998), 1.

⁴ Muhammad Abu Zahrah, *Al-Jarimah Wa Al-Uqubat Fi Al-Fiqh Al-Islami*, (Kairo: Al-Anjlu Al-Mishriyah, T.th.), 22.

⁵ Mustofa Hasan and Beni Ahmad Saebani, *Islamic Criminal Law: Fiqh Jina-yah*, (Bandung: Pustaka Setia, 2013), 15.

⁶ Ahmad Hanafi, *Asas-asas Hukum Pidana Islam*, (Jakarta: Bulan Bintang 1967), 1.

⁷ Neng Djubaedah, *Perzinaan Dalam Peraturan Perundang-undangan di Indonesia Ditinjau Dari Hukum Islam* (Jakarta: Kencana, 2010), 14.

⁸ Zainuddin Ali, *Hukum Pidana Islam*, (Jakarta: Sinar Grafik, 2012), 29.

⁹ Abdurrahman Doi, *Tindak Pidana Dalam Syariat Islam*, (Jakarta: Rineka Cipta, 1991), 31.

the penis into the vagina whose substance is forbidden". Taqiyuddin Al Husain "inserted the male genitals into the genitals of women who were not his mahram". Hanafi "male and female intercourse in the *vagina* that does not belong to him". Hambali "heinous deeds in the anus and *qubul*". Nurul Irfan "forbidden sexual intercourse, outside of marriage".¹⁰

Some of the reasons why adultery is forbidden in Islam include:

1. Adultery is considered an act that prevents the achievement of one of the main objectives of the sharia of Islamic law, which is to maintain the purity and honor of human offspring.
2. In the Islamic view, adultery is one of the three great sins, along with shirk and murder.
3. Adultery is seen as an act that can trigger the occurrence of *other jarimah* (criminal acts) and cause various negative impacts in social life.¹¹

Given the severity of adultery (zina) within the Islamic legal framework, it is crucial to understand that such acts are not only morally reprehensible but are also classified among the gravest sins, parallel to shirk. This shows how heavy the position of adultery is in the Islamic view

إِنَّ اللَّهَ لَا يَغْفِرُ أَنْ يُشْرَكَ بِهِ وَيَغْفِرُ مَا دُونَ ذَلِكَ لِمَنْ يَشَاءُ وَمَنْ يُشْرِكْ بِاللَّهِ فَقَدْ افْتَرَىٰ إِثْمًا عَظِيمًا

"Indeed, Allah will not forgive (sin) for associating with Him (shirk), but He forgives what (sin) is other than (shirk) for whom He wills. Whoever associates with Allah has indeed committed a great sin."¹²

Then Allah emphasized not to approach adultery contained in the verse of the Quran surah al isra verse 32

وَلَا تَقْرُبُوا الزَّوَاجَ إِنَّمَا كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

"And do not approach adultery, for adultery is an abominable deed and a bad way."¹³

One of the acts that is considered close to adultery is *khalwat*. In his book Islamic Criminal Law, Dr. Mardani explained that *khalwat* is the act of being in a closed or hidden place between two people who are not mahrams, without a marriage bond with the willingness of both parties which leads to the act of adultery.¹⁴

Furthermore, it is explained that a mahram is an individual who is haram to be married permanently. They include biological parents and lineage and above, stepparents, biological children and their descendants, stepchildren of married wives, siblings, siblings, siblings, siblings, foster fathers and mothers, paternal and maternal uncles, in-laws both male and female, and sons-in-law and daughters-in-law.¹⁵

¹⁰ Amran Suadi dan Mardi Chandra, *Politik Hukum Pidana Islam*, (Jakarta: kencana, 2016), 313.

¹¹ *Ibid.*, 313.

¹² Departemen Agama RI, QS.An-nisa'[4]: 48, dalam Al-Quran dan Terjemahannya, (Jakarta: Departemen Agama RI, 2005), 86.

¹³ Departemen Agama RI, QS.Al-isra'[17]: 32, dalam Al-Quran dan Terjemahannya, (Jakarta: Departemen Agama RI, 2005), 285.

¹⁴ Perda Aceh, Qanun No. 6 Tahun 2014 tentang Hukum *Jinayat*, Pasal 1 angka (23).

¹⁵ Mahram is a person who is forbidden to be married forever, namely biological parents and so on, stepparents, children and so on, stepchildren of wives who have had intercourse, brothers (siblings, fathers, and mothers) breastfeeding brothers, fathers, breastfeeding mothers, fathers' brothers, mother's brothers, mothers-in-law (boys and girls), sons-in-law (boys and girls). Seen Perda Aceh, *Qanun* No. 6 Tahun 2014 tentang Hukum *Jinayat*, Pasal 1 angka (25).

Then it was explained that *khalwat* is prohibited with the aim of protecting society from various actions that can damage honor, preventing individuals in society from falling into acts that lead to adultery, encouraging active participation in the community in preventing and eradicating *khalwat* behavior or immoral acts, and avoiding moral deterioration.¹⁶

Aceh Province is the only region in Indonesia that applies Islamic Criminal Law, known as *jinayat* law. The application of this law is part of an effort to revive the glory of Islam in the past, as it was enforced during the glory days of previous Islamic kingdoms.¹⁷

In Islamic Criminal Law, the act of *khalwat* is expressly regulated through Qanun Number 6 of 2014 concerning the Law of *Jinayat*, especially in Articles 23 to 32.

Criminal threats contained in Qanun Number 6 of 2014 against *khalwat* perpetrators or people who provide facilities for *khalwat crimes* are threatened with *uqubat ta'zir*, whipping, fines, and imprisonment.

MS Banda Aceh examined the *case of jinayat khalwat* Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna. The verdict against the two perpetrators of the *khalwat crime* in this case was decided free by the Banda Aceh MS. Against the decision, the Banda Aceh District Attorney's Office filed a legal appeal for cassation. However, the Supreme Court rejected the cassation application, so that the free verdict has permanent legal force. This is the background that encourages the author to research these two things as a final project.

METHOD

The research method used in this journal is a normative juridical method, which is an approach that views law as a system of norms. The data collected is sourced from secondary data through *library research* literature studies, *case approach* *case approach*, and historical *historical approach*. The primary legal source in this study consists of the Banda Aceh MS Decision related to the *khalwat criminal case*, namely Decision Number 22/JN/2023/MS. Bna and Number 21/JN/2023/MS. Bna.

ANYLISIS AND DISCUSSION

MS Banda Aceh examined and decided case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna, with the detention of the two defendants starting from May 2, 2023. Both were charged with allegedly committing *jarimah ikhtilat* and *jarimah khalwat*, which are acts of making out and being in a closed room between a man and a woman who are not mahram. The incident occurred on April 30, 2023 at the defendant's residence in case Number 21/JN/2023/MS. Bna.

The two defendants were secured by residents of Gampong Ulee Lheue on April 30, 2023 because they were suspected of making out in a house with the door closed but not locked. After being secured, the two were handed over to the Aceh Province Pamong Praja and Wilayatul Hisbah Police Unit for further processing.

The prosecutor from the Banda Aceh District Court charged the two defendants with two articles, namely Article 25 paragraph (1) which states that "Every person who deliberately commits *jarimah ikhtilat* is

¹⁶ *Ibid.*, Pasal. 3.

¹⁷ Sukiman, "Strategi Pembangunan Islam Di Aceh Pasca Tsunami Menuju Terwujudnya Masyarakat Religius," *Miqot* xxxvi, No. 1 (2012), 207.

subject to *uqubat* in the form of a maximum of 30 lashes, a fine of 300 grams of pure gold, or a maximum prison sentence of 30 months," and Article 23 paragraph (1) which states that "Every person who deliberately commits *jarimah khalwat* is threatened with *uqubat ta'zir* in the form of a maximum of 10 lashes, a fine of up to 100 grams of pure gold, or a maximum of 10 months in prison". In order to prove the indictment, the prosecutor presented a number of witnesses as follows:

1. The reporting witness (defendant's husband Number 21/JN/2023/MS. Bna)
2. Residents of Gampong Ulee Lheu
3. Residents of Gampong Ulee Lheu

In addition to the witnesses that have been mentioned, the prosecutor also presented experts and included statements from the defendants. In submitting this case to the Banda Aceh MS, the public prosecutor also submitted a number of evidence in the form of:

1. (a) Black Dress and Black Veil
2. (one) green t-shirt and black jeans
3. Electronic evidence in the form of (video recording)

The public prosecutor at the Banda Aceh District Attorney's Office prosecuted the defendants based on the demand letter Number: REG. CASE PDM-31/BNA/06/2023 and Number: REG. CASE PDM-32/BNA/06/2023 which basically demands:

1. The defendant in case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna is considered guilty of committing a criminal act/*jarimah khalwat*, namely deliberately being in a closed or hidden place with the opposite sex who is not a mahram and does not have a marriage bond, carried out on the basis of the agreement of both parties, which leads to the act of adultery. This

is in accordance with the subsidiary indictment from the Public Prosecutor which states that the defendants have violated the provisions of Article 23 paragraph (1) jo. Article (1) number 23 of Qanun Aceh Number 6 of 2014 concerning the Law of *Jinayat*.

2. Imposing *uqubat ta'zir* on the defendant Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna in the form of whipping 10 (ten) times, minus the period of detention undergone by the Defendant.
3. Declaring evidence in the form of :
 - a. (one) black robe and 1 (one) black hijab.
 - b. (one) green t-shirt and black jeans.
4. Burdening the defendant to pay a case fee of Rp.2,000 (two thousand rupiah).

The Panel of Judges who examined and decided case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. BNA states:

1. Declaring the defendant Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna, not legally and convincingly proven guilty of committing *jarimah ikhtilat/khalwat* as charged with violating Article 25 paragraph (1) and article 23 paragraph (1) of Qanun Aceh Number 6 of 2014 concerning *the law of jinayat*;
2. Acquitting the defendant Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna, from the Public Prosecutor's indictment;
3. Ordered the defendant Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna was released from custody as soon as this verdict was pronounced;
4. Restoring the rights of the two defendants in ability, position, dignity and their dignity;

5. Charging the state a case fee of Rp. 2,000 (two thousand rupiah)

Regarding case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna, who has been ruled free by the Banda Aceh MS Panel of Judges, the prosecutor submitted a legal remedy in the form of cassation to the Supreme Court of the Republic of Indonesia. However, the Supreme Court Panel of Judges who handled and decided the case rejected the appeal from the Banda Aceh District Attorney's Office and upheld the decision of the Banda Aceh Public Prosecutor's Office through cassation decisions Number 32 K/Ag/JN/2023 and Number 33 K/Ag/JN/2023.

The Judge's Thinking Construction in Examining and Deciding the *Freedom of Crime* in Case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna

In the trial, the judge considers the testimony of witnesses, the testimony of the defendant, and other evidence submitted at the trial to obtain material truth. The legal facts obtained include:

1. The defendant was detained for allegedly committing *jarimah ikhtilat/khalwat*.
2. The problem began with the defendant's husband who brought his friend home to help make *audio editing* because of his husband's disability.
3. The defendant's husband accused the defendant of having an affair with his friend, even though the defendant already felt uncomfortable that there were other people at home.
4. The defendant felt told to admit the act that was not done with the lure to facilitate the examination.
5. On the night of the incident, the defendant did not commit *ikhtilat* or *khalwat*

because he had just quarreled with his husband.

6. At the time of the arrest, the defendant was feeding the child and defendant II (her husband's friend) accompanied her.
7. That witness 1's allegation was related to April 20, 2023, no one else saw it, it was just an accusation from witness 1.
8. That *electronic evidence* in the form of video recordings cannot be used as strong evidence because the public prosecutor cannot present experts in verifying the veracity of the video recordings.

From the facts revealed in the trial, it must be able to prove that the two defendants were right to commit a criminal act as charged by the public prosecutor. Regarding the form of charges filed by the public prosecutor in the form of subsidiarity. Where in the form of a subsidiary indictment, the primary indictment must first be examined. If Primari's indictment is not proven, the examination will continue at the examination of the subsidiary indictment. However, if the primary allegation has been proven, then the subsidiary allegation does not need to be examined again.

The primary indictment in case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna is based on Article 25 paragraph (1), which states that "Every person who deliberately commits *ikhtilat* can be subject to uqubat in the form of a maximum of 30 lashes, a fine of 300 grams of pure gold, or a maximum prison sentence of 30 months." The elements contained in the article are as follows:

1. Everyone
2. Intentionally
3. Doing *ikhtilat*

Against the element of every person: This element refers to the subject of the law, namely every individual who is in the territory of Aceh Province, both Muslim and non-

Muslim, as long as the person is an adult and is classified as *a mukallaf*, and is suspected of committing a prohibited act (*jarimah*). Therefore, the individual can be held accountable for the criminal acts committed, in accordance with the provisions of Article 5 of the Aceh Qanun Number 6 of 2014. Thus, the element of "everyone" in the article is considered to have been legally and convincingly fulfilled.

Against the element Intentionally: for the element intentionally in the Qanun there is no explicit explanation of the meaning of the word "deliberate" in the provision. However, according to the Great Dictionary of the Indonesian Language, "intentional" is defined as something that is planned or intended. In general, this term describes the will of a person to do an action with a certain purpose, where the perpetrator is aware of the consequences of his actions and can be held accountable for the action. According to *Memorie van Toelichting*, the term "intentionally" refers to an action taken when a person really wants to do the act (*willens*) and understands and realizes the consequences of his actions (*wetens*). In other words, an act is said to be done deliberately if it is done with strong intentions and in a conscious state. The perpetrator must have the desire to commit the act and know clearly what he is doing. while Prof. DR. Andi Hamzah in his book *Principles of Criminal Law* explains that "intentional (*opzet*)" means "de (*bewuste*) arah van den wil op een bepaalde misdrijf" which is a conscious will intended to commit a certain crime. According to this explanation, intentionality (*opzet*) is the same as *willens* en *wetens* (desired and known), that the element of intentionally doing *jarimah ikhtilat/khalwat* can be interpreted as wanting and knowing that someone who does an action intentionally, must want and realize the action and as a result

it can be said that intentionally means wanting and knowing what was done that in the trial, from the testimony of defendant I and defendant II in this case as witness IV, the two defendants did not have a special relationship, the relationship between the two defendants was only as a person who worked to deliver the children of defendant I at the request of witness I and deliver ready-to-eat meals which then defendant II received wages from the work. The existence of defendant II is the person who was brought/invited by witness 1 to enter the house because both of them had a music Job *Recorder* , so that they sometimes worked until late at night, until defendant II often slept at the house of witness 1. Then what defendant II did both to take the child and defendant I with the permission and knowledge of witness 1. Furthermore, on April 19, 2023 at around 03.00 WIB referred to by the JPU, it was an accusation from witness I himself and at the trial there were no witnesses who knew about it, based on this information the element of deliberately committing *ikhtilat* was not fulfilled. Furthermore, the Panel of Judges was of the opinion that the primary demand was declared rejected.

Because the primary indictment from the prosecutor was not proven, the investigation continued to the subsidiary indictment. In case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna, the subsidiary indictment refers to Article 23 paragraph (1), which states that "Every person who deliberately commits *jarimah khalwat* is subject to *uqubat ta'zir* in the form of a maximum of 10 lashes, a maximum fine of 100 grams of pure gold, or imprisonment for a maximum of 10 months." The elements contained in this article are as follows:

1. Everyone
2. Intentionally
3. Performing *khalwat*

In examining the subsidy charges, there is also an element of "deliberately" that is not met. In connection with the existence of elements that are not fulfilled in the subsidy indictment, the subsidy indictment is not proven either. In its deliberation, the Panel of Judges then used the following principles:

1. *Asas Unus Testis Nullus Testis*
2. *In Dubio Pro Reo Handles*
3. *Tabayyun and Tasabbut*

This is the construction of the judge's thinking in examining and deciding on the acquittal of *khalwat* in case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna.

Analysis of the Judge's Thinking Construction of the Khalwat Criminal Acquittal in Case Number 21/JN/2023/MS. Bna and 22/JN/2023/MS. Bna

The Panel of Judges in examining this case followed the indictment filed by the JPU. The same thing was also done by the Banda Aceh MS Panel of Judges. Because the indictment from the Banda Aceh District Attorney's Office was prepared in the form of subsidiarity, the Panel of Judges first examined the primary indictment, namely Article 25 paragraph (1) of Qanun Number 6 of 2014 concerning the Law of *Jinayat*, which reads: "Every person who deliberately commits *ikhtilat* is threatened with *uqubat* in the form of a whip at most 30 times, a fine of 300 grams of pure gold, or imprisonment for a maximum of 30 months". with elements:

1. Everyone
2. Intentionally
3. Doing *ikhtilat jarimah*

The element of "everyone" is very *urgent*. so that there are no mistakes or mistakes in arrest or detention. Where the person who

should be arrested or detained is the person who should be responsible for the criminal act that occurred. If the mistaken identity of the defendant, such as the difference between what is stated in the indictment and what the judge stated at the trial, "may" be used as a reason to cancel the indictment.¹⁸ A legal term that often appears in the state of mistaken identity of the defendant is often referred to as *Error In Persona*.

The Banda Aceh MS Panel of Judges is of the opinion that the defendant as a person who must be held accountable states that the element of "everyone" in article 25 paragraph (1) of Qanun Number 6 of 2014 has been fulfilled in line with the principle of prudence in examining the case.

The element of "deliberately" became the focus of the examination after the first element in Article 25 paragraph (1) of Qanun Number 6 of 2014, namely "everyone", was declared to have been fulfilled. Furthermore, the Banda Aceh MS Panel of Judges examined the second element, namely "deliberately". In its consideration, the Panel referred to the explanation in the *Memorie van Toelichting* which states that an act is considered to be done deliberately if the perpetrator wants the act (*willens*) and understands or is aware of the consequences caused (*wetens*). In other words, an act that is done intentionally is an action that is done consciously, with clear intentions, and accompanied by a full understanding of the consequences.

while Prof. DR. Andi Hamzah in his book "Principles of Criminal Law" explains that "deliberate (*opzet*)" means "de (*bewuste*) richting van den wil op een bepaalde misdrijf" which is a conscious will intended to commit a certain crime. According to this explanation,

¹⁸ M. Yahya Harahap, *Pembahasan Permasalahan dan Pelaksanaan KUHP*, Edisi Kedua, Edisi Kedua Belas (Jakarta: Sinar Grafika, 2010), 121.

intentionality (*opzet*) is the same as *willens en wetens* (desired and known), that the element of deliberately doing *jarimah ikhtilat/khalwat* can be interpreted as wanting and knowing that someone who does an action intentionally, must want and realize the action and its consequences. So it can be said that intentionally means wanting and know what to do. Furthermore, on April 19, 2023 at around 03.00 WIB referred to by the JPU, the accusation from witness I himself and at the trial there were no witnesses who knew about it, based on this information the element of deliberately committing *ikhtilat* was not fulfilled.

The panel of judges' consideration of the element of "deliberately" is in line with the opinion of *wilstheorie* experts quoted by Marsudi Utoyo in 2020 in his journal entitled "Intentionally and Unintentionally in Indonesian Criminal Law" citing the opinion (*wilstheorie*) according to this theory that a person is considered "deliberately" to commit an act (criminal) if that person wants to do the act, thus a person is said to "intentionally" commit an act (criminal) if in the person has the "will" to realize the elements of delikencies (criminal)¹⁹

This is the opinion of M. Yahya Harahap, regarding the element of "deliberately" is that the public prosecutor must be able to prove the existence of this subjective element (error) in the perpetrator. The panel of judges was of the opinion in its verdict because there was only 1 witness who stated that the two defendants committed an affair, namely only 1 witness. Thus, the Banda Aceh MS Panel of Judges stated that the element of "deliberately" was not fulfilled, so the primary indictment filed by the public prosecutor was not proven.

In article 23 paragraph (1) of Qanun Number 6 of 2014 which reads "Every person who deliberately commits *jarimah khalwat*, is threatened with *uqubat ta'zir*, whipping a maximum of 10 times or a maximum fine of 100 grams of pure gold or imprisonment for a maximum of 10 months". In this article there is also an element of "deliberately" as contained in article 25 paragraph (1) of Qanun Number 6 of 2014. So that the element of "deliberately" in article 23 as the prosecutor's subsidy indictment from the Banda Aceh District Attorney's Office is not fulfilled, the subsidy indictment is not proven.

So far, the author still agrees with the Banda Aceh MS Judges. The author's opinion differs from the opinion of the Banda Aceh MS Panel of Judges who examined case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna is against the statement of the Banda Aceh MS Panel of Judges which stated that in this case there was only 1 witness and continued with the use of *the principle of Unus Testis Nullus Testis*.

According to the author's opinion, the witnesses in this case as submitted by the public prosecutor are as many as 3 people (not 1 person as called by the Banda Aceh MS Judges Panel). Thus the application of *the principle of Unus Testis Nullus Testis* becomes inappropriate.

The panel of judges at the Banda Aceh MS who examined case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna also uses the principle of *In Dubio Pro Reo* which means more or less "it is better to free a thousand guilty people than to punish one innocent person". The use of this principle in case Number 21/JN/2023/MS. Bna and Number 22/JN/2023/MS. Bna gave the impression of

¹⁹ Leden Marpaung 2005, *Asas-Teori-praktik Hukum Pidana*, (Jakarta: Sinar Grafika, 2005), 44.

hesitation from the panel of judges while in his examination it was clear that the public prosecutor's indictment was not legally and convincingly proven. So that in the examination of this case there is no doubt, the panel of judges should have expressly stated that the two defendants were not proven to have committed a criminal act, and did not take refuge with the hope of *In Dubio Pro Reo*

CONCLUSION

the Banda Aceh MS Panel of Judges deliberated on the indictment filed in a subsidiary structure by the Public Prosecutor. Upon review, the element of 'intentionality' was found lacking in both the primary and subsidiary charges under Qanun Number 6 of 2014, leading to the defendants' acquittal. The cassation legal remedy submitted by the prosecutor from the Banda Aceh District Court was rejected by the panel of cassation judges at the Supreme Court. However, the Panel's assertion that only one witness was present and the subsequent application of the *Unus Testis Nullus Testis* principle does not align with the documented presentation of three witnesses. Additionally, invoking *In Dubio Pro Reo* in a context where the evidence clearly fails to prove guilt may create an impression of undue hesitation. In fact, in the facts of the trial the elements are expressly and clearly not proven, so it is not necessary to cite the principle of *In Dubio Pro Reo*.

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