

ADMISSIBILITY OF ELECTRONIC EVIDENCE*

Relevance of Electronic Evidence:

Increasing reliance on electronic means of communications, e-commerce and storage of information in digital form has most certainly caused a need to transform the law relating to information technology and rules of admissibility of electronic evidence both in civil and criminal matters in India.

This increased use of technology, however, poses challenge accommodating and reflecting the new age developments across jurisdictions, which in turn has provided the much required impetus to the emergence and appreciation of appreciation of digital evidence. Keeping up with the times, requisite amendments were also made to Indian laws in the year 2000 with introduction of the Information Technology Act, 2000 ('IT Act'), which brought in corresponding amendments to existing Indian statutes to make digital evidence admissible. The IT Act, which is based on the UNCITRAL Model Law on Electronic Commerce, led to amendments in the Indian Evidence Act, 1872, ('Evidence Act'), the Indian Penal Code, 1860 ('IPC') and the Banker's Book Evidence Act, 1891.

With the change in law, Indian courts have developed case law regarding reliance on electronic evidence. Judges have also demonstrated perceptiveness towards the intrinsic 'electronic' nature of evidence, which includes insight regarding the admissibility of such evidence, and the interpretation of the law in relation to the manner in which electronic evidence can be brought and filed before the court.

Recently, the Supreme Court of India in the case of Anvar P.K. vs. P.K Basheer & Ors., overruled the earlier decision in the case of State (NCT of Delhi) v Navjot Sandhu, also popularly known as the 'Parliament Attack' case. The Supreme Court redefined the evidentiary admissibility of electronic records to correctly reflect the provisions of the Evidence Act by reinterpreting the application of section 63, 65 and 65B.

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Principle Provision of Evidence Act:

As we know the Evidence Act was drafted to codify principle of evidence and fundamental rule of evidence. The definition of 'evidence' has been amended to include electronic records. The definition of 'documentary evidence' has been amended to include all documents, including electronic records produced for inspection by the court. Section 3 of the Evidence Act, 1872 defines evidence as under:

“Evidence”- Evidence means and includes:-1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; 2) all documents including electronic records produced for the inspection of the court. Such documents are called documentary evidence.

Section 62 of the Evidence Act says primary evidence of the contents of a documents is the document itself. On reading section 63, Secondary evidence of the contents of a document includes, amongst other things, certified copies of the document, copies made by mechanical processes that ensure accuracy, and oral accounts of the contents by someone who has seen in Section 65 of the Evidence Act and the secondary evidence listed in section 63 can be used to prove its content.

Prior to 2000 in India, electronically stored information was dealt with as a document, and secondary evidence of electronic records were adduced as 'documents' in accordance with section 63 of the Evidence Act. Printed reproductions or transcripts of the electronic record would be prepared and its authenticity was certified by a competent signatory, who would identify their signature in court and be open to cross examination. However, this procedure was rather archaic, based on the law drafted a century ago, and did not include the meta data where it was available, such as the header information in e-mails, for instance. This long drawn procedure. It was time to introduce new provisions to deal exclusively with evidence that is available in digital form. As the pace and proliferation of technology expanded, the creation and storage of

electronic information grew more complex, the law had to change more substantially.

Admissibility of Electronic Records:

Anvar v. P.K. Basheer declared new law in respect of the evidentiary admissibility of the contents of electronic records, overruled the earlier Supreme Court judgment *State (NCT of Delhi) v Navjot Sandhu alias Afsal Guru* (2005) 11 SCC 600 and the application of Sections 63, 65, and 65 B of the Indian Evidence Act, was re-interpreted.

The electronic records involved in Anvar's case were some Video CDs containing the electronic propaganda announcements, interviews, and public meetings alleged to have been made by the respondent's side, which were originally recorded in mobile phones and movie cameras, and the same were transferred to computers, and by using the said computers as devices for data transferring, the CDs were produced. The CDs so produced were marked before the court as evidence, without being produced the originals. Anvar P.V. Case is silent about the fact concerning the exact nature of those electronic records involved therein. As endorsed by the Court from the argument of the counsel for the petitioner, it is clear that "the evidence is that the witnesses recorded the speeches, songs and announcements either in their cell phones or in the case of PW38 in a digital camera and what is produced is only the CDs and when the primary evidence is the original recorded in camera, cell phone or the respective computers in which they were transferred and then made the CDs and as the primary evidence is not produced."

While overruling the law declared in *Afsan Guru*, the Supreme Court said: "**.....the statement of law on admissibility of secondary evidence to electronic records, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc.,the same shall be accompanied by the certificate in terms of Section 65B obtained**

at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible....”

The Court further held that:- “The Appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P10,P12,P13,P15,P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground,”The above CDs are Electronic Records within the meaning of Section 2(1) (t) of the Information Technology Act (the IT Act), as amended in 2008, which “means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche” As per Section 65B of the Act, if the original electronic record itself is produced before the Court as evidence it need not be supported by the certificate, only those electronic records which are printouts, originals copies of CDs, pen drives or other digital storage devices are to be certified, where the conditions contained in Section 65B (2) of the Act apply. In fact Section 65B is a provision which deems the copies of contents of original electronic records to be documents (within the meaning of Section 64) and makes admissible without complying with the rules as to the admissibility of secondary evidence contained in Section 65 and Section 66 of the Act. The conditions in **Section 65B (2)** of the Act are:-

- (i) At the time creation of the electronic record, the computer that produced it must have been in regular use;
- (ii) The kind of information contained in the electronic record must have been regularly and ordinarily fed into the computer;
- (iii) The computer was operation properly; and,
- (iv) The duplicate copy must be a reproduction of the original electronic record.

Under **Section 65B (4)** of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible only when there is a certificate:

- a. Identifying the electronic record containing the statement;
- b. Describing the manner in which the electronic record was produced;
- c. Furnishing the particulars of the device involved in the production of that record.
- d. Dealing with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- e. Signed by a person occupying a responsible official position in relation to the operation of the relevant device.

As was clarified, the person issuing the certificate is only required to state that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc(VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence.

In this situation question is inevitably arising. In Anvar's case the difficulty was, though the originals might have been produced, the same were not produced. Here, the computer was used only for the purpose of making the CDs, to contain the information recorded in and transferred from either mobile phones or digital cameras. The original information was initially put in to either the cameras or phones during the recording time, and those device may also be considered as computer, if its function is according to Section 2(1)(i) of Information Technology Act. If that be the case, the certificate of 65B of the Act also should have been necessary for the outputs produced from the cameras and phones. In Anvar's case, even though the Supreme Court has mentioned that the electronic record is to be supported by the certificate under Section 65B of the Act(when adduced as secondary evidence), to which the conditions laid down in

Sub-section (2) thereof are applied, the overall reading of the decision is making an impression that all the electronic data are to be supported by such certificate when produced as secondary evidence, whether or not the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer. In Anvar's case, it is not mentioned, whether the computer in question was regularly used to store or process information or had used only for the purpose of copying the contents of the information captured in mobile phones and digital cameras. What is clear from the fact is that the computer in question was used only as a device to transfer data from one medium to another. So the question is, was it necessary to have a certificate for the CDs produced in Anvar's case for admitting those as secondary evidence?

**Supreme Court on CCTV Footage as the best evidence
The Tomaso Bruno Case**

Facts

The case concerned an appeal by two Italian nationals who were convicted for the murder of another Italian national during their trip to Varanasi. All three, i.e. the two appellants and the deceased were sharing a hotel room at the time of death. The cause of the death was asphyxiation and most of the evidence was circumstantial. The defence of the appellants was that the death occurred during their absence as the deceased was not feeling well and could not join them in an excursion.

The prosecution version it appears is that the appellants did not go for any such trip and hence could not avail the plea of alibi. In counter to this the defence relied on the absence of several pieces of digital evidence such as CCTV footage and SIM card details to argue that the prosecution failed to prove any such case beyond reasonable

doubt.

Issue

Will the absence of production of CCTV footage lead to the acquittal of the appellants?

Decision and reasoning

The reasoning of the court commences from Paragraph 21 of the Judgement. The court first notes the nature of the case and the relevance of the CCTV footage. Towards this the court notes that the case of the prosecution is largely circumstantial. There are no eye witnesses and medical evidence is limited to citing the cause of death as asphyxiation.

Further the conviction of the appellants was based on the testimony of the Hotel Manger and the Investigation Officer of the police, who stated that they saw no ingress into the hotel room of the deceased. This was based on viewing the CCTV cameras installed in the common areas of the hotel. However, the CCTV footage by itself was not adduced as evidence by the prosecution. Hence, in any case the court reasons that the CCTV footage constituted the best evidence.

The effect of non-production of not adducing the best evidence is viewed by the Court as material suppression which leads to an adverse inference under Section 114(g) of the Evidence Act. It is important to note that the reasoning of the Court is not limited to the absence of CCTV footage. It also involves the inconsistencies in the testimonies of the prosecution witnesses and the medical examination.

On the basis of the above the Court in Paragraph 42 state that,

"That courts below have ignored the importance of best evidence i.e. CCTV camera in the instant case and also have not noticed the absence of symptoms of strangulation in the medical reports. Upon consideration of the facts and circumstances of the case, we are of the view that the circumstances and the evidence adduced by the prosecution do not form a complete chain pointing to

the guilt of the accused and the benefit of doubt is to be given to the accused and the conviction of the appellants is liable to be set aside."

Analysis

1. The application of this case appears to be limited and may be only extended to prosecutions in which there are no eye witnesses and the case solely relies on circumstantial evidence. Hence, it may be distinguished on facts if it is sought to be used as a general rule stating that the absence of CCTV footage leads to an acquittal by default. Any such broad and general reading would be incorrect.
2. Another factor which may lead to a limited reading of the rule is the location and the number of CCTV's which are placed. This will vary as per the premises and the number of people having ingress in the area. In a hotel lobby, or in the corridor where the room is located, such CCTV footage may constitute the best evidence given the limited number of people who may go through it, however in a public area such as a bus station, CCTV footage from a distance may not constitute the best evidence (Read Para 22).
3. The Court incorrectly cites that case of State of NCT Delhi v. Navjot Sandhu (Afzal Guru-parliament attack case), which has been expressly overruled by the Supreme Court itself in its judgement of Anvar P.V. vs P.K. Basheer & Ors. It is unfortunate the court cites it as an illustration for, "production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency"
4. Again, the Court's determination is not limited to the CCTV footage but extends to the inconsistencies in the witness statements as well as medical examination. CCTV footage though termed as the best evidence is not the sole determination in the case leading to the acquittal of the accused.
