



Study on Digital Evidence Acceptability under Evidence Act 1872: Bangladesh Perspective

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ABSTRACT

Bangladeshi evidence law does not enclose any utter condition for the acceptability of digital evidence. Though, any law is hypothetical to reproduce the altering requirement of civilization. So, a applicable query arises: is digital evidence allowable in Bangladeshi evidence law? Such an exciting inquiry is investigated in this piece of writing. It submitted that there are scopes for digital evidence to be allowable within the law that is through a broad understanding of the term 'Document', as material things other than document, and through precedential development of case laws. Similarly, it is suggested that digital report must be incorporated under the Evidence Act, of 1872 and legislators must take actions in this look upon so that digital evidence can be allowable previous to the Court as the national and public life circulates just about the digitalized structure. Digital evidence can help make sure that fairness is served in court. To criminal and prevent crime, digital evidence may be one of the most effective strategy to use in Bangladesh's legal method. The present paper attempts to give imminent into the idea, possible lawful applicability, and limits of digital evidence as to the best evidence in Bangladesh.

Keywords: *Evidence Act 1872, Bangladesh, electronic evidence, document, digital evidence*

INTRODUCTION

The Evidence Act, 872 in vogue in our country is almost 150 years old! Having been enacted by the British, this piece of colonial legislation has been one of the most important tools for ensuring justice in these parts of the world. At the time that the Evidence Act, 1872 came into being, there were, unlike today, no digital devices being used by the people at large. But over the years, things have changed to such an extent that the world has become sort of a digital playground; life sans digital devices is beyond imagination now. And herein the question of digital evidence comes into play. To define 'Digital Evidence' simply, it may suffice to say in our domestic setting that digital evidence refers to any information stored or transmitted in electronic form on devices such as audio-visual cassettes or discs that may be produced in a case or suit being tried by a court of law.

From British colonial period to the present age of digitalization, Bangladesh has come a long way. Gradually, its legal system adopted necessary measures conforming to the changing necessity of laws and lifestyle of people. Nevertheless, there are quite a few provisions that still need to equip themselves properly in order to be applicable in appropriate cases. One of the notable instances is Section 3 of the Evidence Act, 1872 (Act No. I of 1872). Despite being a parent law regarding the substantive and procedural regulation of evidence in our country, this Act has still not recognized

digital records as evidences. That is why the scope and applicability of its provisions are often limited and cannot be used as an efficient tool for ensuring justice. After intense scrutiny, we have found some scopes using which digital evidence can be produced under the Evidence Act, 1872.

ORIGIN, CONCEPT, AND OBJECTIVES OF DIGITAL EVIDENCE

Concept of Digital Evidence

Digital Evidence is a process of finding evidence and of Identification, preserving, extracting, and documenting such evidence derived from digital media like computers, mobile phones, servers, or networks which are or can be used in the court of law to solve or adjudicate case law. Digital Evidence is basically of probative value. It is stored or transmitted in a binary form though later it was transformed from binary to digital. Computer evidence, digital audio, digital video, cell phones, and digital fax machines are all examples of digital evidence.

Evidence found on digital devices such as telecommunications or electronic multimedia devices can also be considered. Electronic evidence includes emails, digital photographs, ATM transaction logs, word processing, documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser history databases, contents of computer memory, backups, printouts, GPS tracks, and digital video or audio files.⁸ Digital evidence is information or data saved on, received by, or transferred by an electronic device. A party to a lawsuit may use digitally stored or transmitted evidence at trial. It is "probative information stored or transmitted in binary form".

BACKGROUND OF DIGITAL EVIDENCE

The birth of Digital Evidence has been a response to a demand for service from the law enforcement community. To meet the need the Federal Crime Laboratory directors in Washington DC formed a group known as Scientific Working Group Digital Evidence (SWGDE) in order to find latent Evidence on a Computer. The concept of digital evidence was proposed to federal laboratory directors on March 2, 1998. And for the first time in 2002, the Scientific Working Group on Digital Evidence (SWGDE) published the first book about digital forensics called "Best practices for Computer Forensics".

OBJECTIVES OF THE STUDY

The primary goals of digital evidence are to assist in the recovery and preservation of computer and contemporary technology-related evidence to be used in court. It assists in determining the crime's motive, identifying the perpetrator, and designing procedures for suspected crimes without contaminating or modifying digital evidence. One of the most important goals is to be able to recover erased files from digital media, extract them, and validate long-lost items.

RESEARCH METHODOLOGY

The research will be conducted following the qualitative research method. The tools in books, journals, articles, and legal perspectives regarding Digital Evidence of various countries will be discussed and analyzed to reach the purpose of this research. As primary Sources, this dissertation has relied on Acts of parliament and Judicial decisions. And as Secondary Sources, it has relied upon books (textbooks, literary criticism), Editorials and commentaries, Encyclopedias, Journal articles, Reviews, Theses, etc.

Digital Evidence and the reasons behind exclusion under the Evidence Act 1872:

According to Black's Law dictionary, the term 'digital' refers to data represented in binary code¹. 'Evidence' generally means any information, data or document which can be produced before the Court in a trial to prove or disprove a particular contention.

Digital records are not recognized as evidence under the Evidence Act. The Evidence Act was enacted in 1872 was imported into our land through the laws Continuance Enforcement Order, 1971. Since then, it has been operating as the principal law regulating evidence in different cases. According to the provision of the Act², "Evidence" means and includes-

- (a) All statements which the Court permits or requires to be made before it by witnesses or oral evidence;
- (b) All documents produced for the inspection of the Court or documentary evidence.

Evidence is either oral evidence or documentary evidence. But the term does not explicitly include any electronic/digital data or record as evidence.

There have been allegations that the main reason as to why digital evidence has not been included under the Act is this kind of evidence are easily alterable. They are often not authentic and it is extremely hard for a developing country like Bangladesh to prove their authenticity beyond reasonable doubt. Another contention is our Police force is not qualified and well-equipped to collect, record, produce and corroborate these evidences properly. So, their admissibility is not encouraged under this Act.

However, in our opinion, these are nothing but mere excuses and fallacies. Under several legislation of the same country, digital records are admissible as evidences and are being produced in trials at a large scale. The same Police are collecting, preserving and producing the evidence based on which suits are being disposed of. So, these excuses do not stand a chance on ill equipment ground.

Moreover, the Evidence Act has made expert opinion admissible under Section 45. So, corroborating and proving the merit of digital evidence beyond reasonable ground is not a challenge under this Act.

The main reason of this exclusion is the lack of intention of our legislatures. When the Act was drafted and came into force, there was no concept of digital documents in our sub-continent or other parts of the world. So naturally the definition of documents would not include digital records at that time. But at this modern age, admissibility of digital evidence is a crying need for insurance of justice and inclusion of such is a must. While we can include and produce digital evidence under other laws, there can be no satisfactory ground existing to support the continuity of such exclusion.

Importance of Digital Evidence and its status as Best Evidence rule

The value of digital evidence cannot be overstated. Unlike paper records, digital/electronic devices can generate data faster.³⁶ Not only that, but people of all ages, groups, and fields now generate computerized information faster than paper records. Indeed, computers are now so widespread that most court cases include the finding of computer-stored data. Digital Evidence tends to be more voluminous, harder to destroy, more easily updated and replicated; perhaps more expressive and readily available. Moreover, unlike paper documents, electronic records are kept and can be restored even after deletion. Paper records can be readily thrown out or shredded, however digital or electronic documents can be restored. Unlike paper records, electronic evidence is extremely durable.

A digital document incorporates metadata; a paper copy of the digital document may not satisfy the best evidence requirement. Metadata is embedded information in digital documents that is not apparent when printed. Metadata is usually invisible while reading a digital document on a computer screen via a software program. The information created by a word processing document describes the document, its author, the date it was created, and any changes made. Email metadata tells you who blind-copied it and when it was read, but a physical printout doesn't. Metadata can be vital in some instances. In others, its paper counterpart will suffice. The court also observed that without preserving the electronic record, "essential transmittal information relevant to a fuller understanding of the context and importance of electronic communication will simply vanish."⁴¹ In other circumstances, it has allowed the court to obtain evidence that it would not have otherwise. Digital evidence has been used in court for audio enhancement, photo enhancement, forensic video analysis, and latent fingerprint enhancement.

Judicial Decision on the Admissibility of Digital Evidence in Bangladesh

Digital evidence is used in civil, criminal, and cybercrime cases. Although there is no specific law in Bangladesh governing the use of digital evidence, it has been observed in some of the most notable cases. As previously stated the incorporation of digital evidence is required and can be achieved by amending and interpreting current legislation.

The definition of "any matter expressed or described upon any substance by means of letters, figures or marks" of Documentary Evidence is cited in section 3 of the Evidence Act 1872, section

3(16) of The General Clauses Act, 1897 and section 29 of Penal Code, 1860 can be interpreted to include digital evidence since the word “matter” is a term of the widest amplitude. It further notions that Judicial interpretation articulates digital evidence as an amplification of matter expressed or described upon the digital substance by means of letters, figures, or marks and inclusive of material and secondary evidence and that it verbalizes the other forms of digitalization having a similar legal entity. Now if the question arises of the authentication of digital evidence then there is the scope of expert opinion clearly mentioned in the Evidence Act, section 45 where if needed the court can call for expert opinion. Furthermore, Section 165 and 161 of the Code of Criminal procedure also empowers the investigating officers to attach anything and examine and cross-examine the maker of the documentary evidence.

In one of the leading Biswajit murder cases, it was seen that the video footage of the incident was handed over to the investigating officer and its recording was also authenticated. So, it can be said that digital evidence is admissible in the context of Bangladesh and that there lies no bar to that. In the Case of Mrs. Khaleda Akhtar Vs. The State the prosecution wanted to introduce a video cassette as evidence in the petitioner's case. The trial judge granted the prosecution's request. Later, the aggrieved petitioner filed a criminal revision against the judgment alleging that the videocassette is not a document as stated in section 3 of The Evidence Act. Per Mr. Justice A.T.M. Afzal, the High Court Division provided a constructive analysis of the term ‘matter’ contained in Section 3 of the Evidence Act, 1872. He opined that the term “matter” occurring in the definition of section 3 is of the widest amplitude. He further added that if for the purpose of recording specific matter on magnetic tapes for the purpose of showing it on television by application of technology, a video cassette or tape is made, then we hardly see any reason why the same shouldn't come within the definition of document. It was also pointed out in court that since sound recorded on a cassette may be used in court; there is little reason why a recording of sound and visuals can't be used in court as well. Thus, the court found no ground to not to hold videocassettes within the definition and meaning of the document of the Evidence Act.²⁵ In the case of The State Vs. Qamrul Islam & Others reported in, Mr. Justice Md. Jahangir Hossain held that they also find it inclined to hold a video record footage within the meaning of document under the Evidence Act and is accordingly admissible in the court if otherwise relevant in course of a trial of the proceeding.

CONCLUSION

The Evidence Act of 1872 transformed the entire system of notions regarding the admissibility of evidence in courts of law. However, the rules of evidence were based on the conventional legal system. The world has changed a lot since then. However, it is regrettable that parts of Bangladesh have yet to adopt electronic/digital evidence regulations. However, if incorporated, our legislators and judiciary will be able to take even more effective measures to ensure justice and will be able to use this as a tool to accomplish so.

After considering all the available scopes, we finally submit that digital records must be included under the Evidence Act, 1872 as evidence and be allowed to be admissible before the Court. Considering the geo-political similarities of us with India, we have relied on their laws, policies and judgment so many times due to their great persuasive value. Following that trend, we should amend

the provision of section 3 including digital records within the purview of documents. This will help to eradicate all the hesitations of our judiciary to utilize and rely on digital evidences and will eventually work as a more convenient tool for ends of justice. This is the legislators who holds the authority to do so and are recommended to take the effective measures as soon as possible. When the national and public life circulates around digitalized system, contending that digital records do not qualify as evidence is nothing but an excuse. Now it is high time we made it admissible under the Evidence Act and give it a broader scope to be applied.

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