

Digital Evidence: Some Must Needed Amendments

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"Salman Shah didn't kill himself, he was murdered," Rabeya Sultana Rubi, one of the accused in the popular actor's death and expatriate in the USA thus began her "confession" in a video posted on Facebook.¹ Could this clip be used as evidence in Salman Shah murder under the Evidence Act, 1872?

Science and technology as well as law are dynamic and changing with the moving civilization. In administration of both civil and criminal justice, evidence is inevitable part of any legal system. Historically hearsay testimony was the sole source of evidence during many civilizations like Roman,² Greek etc. During Hindu³ and Mughal period,⁴ separate rule of evidence was followed.

What is Evidence:

Generally, evidence means anything by which any assertion or denial can be proved or disproved in a trial. Evidence has defined as "information drawn from personal testimony, a document, or a material object, used to establish facts in a legal investigation or admissible as testimony in a law court." But in the Evidence Act, 1872,⁵ section 3 has provided that, "'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 produced for the inspection of the Court; such documents are called documentary evidence."

This section doesn't include any sort of electronic or digital evidence. But in India, legislators have amended section 3(2) as follows: all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

What is Digital Evidence:

"Digital evidence is information and data of value to an investigation that is stored or, received, or transmitted by an electronic device."⁶ This working definition from NIJ is not exclusive to digital evidence, in that the analysis of physical data (such as DNA or fingerprints) could technically meet the definition as computers are used to process physical items⁷. Digital evidence not only includes the physical item of data or

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¹ 'Salman Shah was murdered,' The Daily Star, August 9, 2017, Available at www.thedailystar.net/city/bangla, Last Visited: 7 November 2017

² Wigmore, John H., Required Number of Witnesses: A Brief History of the Numerical System in England, The Harvard Law Review Association, Vol. 15, pp. 83-108

³ Gandhi, B.M. Landmarks in Indian Legal and Constitutional History, 9th Edition, Eastern Book Company, Lucknow, 2009, p.11

⁴ *Ibid*

⁵ Act No.1 of 1972

⁶ Goodison, Sean E., Devis, Robert C., Jackson Brian A., Digital Evidence and the US Criminal Justice System, National Institute of Justice, 2008, p.26

⁷ *Ibid*

technology but also includes any interior or external state of technology or data. For example, computer doesn't only mean the sole monitor or CPU, is also includes mouse, cable, software etc.

Importance for Incorporation of Digital Evidence

The fundamental law of Evidence, the Evidence Act, 1872 is still backdated in-coordination with the fast growth of science and technology. Legal professionals *i.e.*, lawyers, judges, experts etc. are basically reliable on Evidence Act, 1872 in respect of evidence to prove or disprove any case. Absence of the admissibility of digital evidence often creates confusion among judges, lawyers, investigative agencies and parties. Tech-based crimes or crimes using e-devices or modern technologies are frequently increasing day by day. Cybercrime, hacking, online bulling, online harassment, stealing data, violation others personal information, online threat etc. are very common crimes now-a-days. Bangladesh has over 79.227 million of internet users. It has created a high risk of online crimes using technologies.⁸ Many of this increasing number of Internet users are involved in various offences via social media, email, portal, blog etc. In disposition of these crimes, lawyers, parties, law enforcement agencies may require placing many important digital evidences before Courts. But now there is no such scope under the Act. Now a question may come, what is the necessity of incorporating digital evidence into the Act when other laws are providing few remedies but not fully. As both civil and criminal proceedings are directly related to the Evidence Act, 1872 question of admissibility or relevancy comes here through the ICT Act, 2006, Pornography Niyontran Ain 2012 etc. though admitted all forms of electronic or digital evidences but they are special laws, not general laws for the respective offences.

How Digital Evidences Are Currently Admitted

Though the principal Act on evidence the Evidence Act 1872 doesn't contain specific and clear provisions regarding digital evidence, there are some legislations to address digital evidences such as Section 16 of the Speedy Trial Tribunal Ain 2002⁹, has admitted any sorts of photographs, recordings as evidence during trial. Under Section-14 of Ain Sringkhola Bighnokari Aporadh Ain 2002¹⁰, photograph and in doer are admissible. Pornography Niyontran Ain 2012 also admitted all forms of electronic devices in Section-6 of this act. ICT Act 2006¹¹ has also included all digital or electronic evidences.

Problems with Existing Laws

Abovementioned laws are enacted as special laws to redress any specific crime. But at large most of the civil and criminal suits can be categorized as general not special which are dealt with the help of the evidence Act 1872. So, it creates an irregularity in the whole legal system.

Challenges in Introducing Digital Evidence:

There are some structural challenges facing the courts in introducing the Digital Evidence in our court system:

⁸ The total number of Internet Subscribers has reached 79.227 million at the end of September, 2017, Reported in the www.btrc.gov.bd/content/internet-subscribers-bangladesh-september-2017 , Last visited on 7th November, 2017

⁹ Act No. 28 of 2002

¹⁰ Act No. 11 of 2002

¹¹ Act No. 39 of 2006

1. *Firstly*, our court rooms are not well-equipped to support digital evidences. So, the incorporation of digital evidence requires the arrangement of court rooms first.
2. *Secondly*, our judges and court staffs are not experienced or acquainted with such matters. It will be a challenge to train them.
3. *Thirdly*, common people may face hurdles with such change specially the people who are ignorant of technology.
4. *Fourthly*, Digital evidences can be easily modified, altered or transmitted. It may create a scope of altering important evidences unless precautionary measures are taken.
5. *Fifthly*, Quality IT experts may be required to deal with the modern technologies.

Provisions Requiring Amendment:

Section 3 on Definition of Document: The definition of document has included any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. So, the term substance shall include electronic device and substance in this section. In this interpretation clause, the given definition of evidence should be amended including digital evidence. This section only stated oral and documentary evidence but not the digital evidences. In India, legislators have amended section 3(2) as follows: “All documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.”

Chapter II on Relevancy of Facts: Chapter II (Section 5 to 55) deals with the relevancy of facts, admissions, statements by persons who cannot be called or witness, statements made under special circumstances, judgements of courts of justice, opinion of third party and character. In this chapter, there is no such provision declaring the digital evidences relevant. In this proposed amendment specific provisions should be added giving the relevancy.

Section 45 on Expert Opinion: This section stated the definition and relevancy of the opinions of experts. In this section experts are defined as persons from whom opinion can be asked upon – i) point of foreign law, ii) science, iii) art, iv) identity of hand writing, v) finger impression. The section should specially include IT experts as expert in the list.

Chapter V on Documentary Evidence: This chapter has stated provision regarding documentary evidence.

Primary Evidence (Section 62): As per section 62 of the Act, primary evidence means the document itself produced for the inspection of the court. Herein, digital documents are not recognized as part of primary evidence. Any original document or data or file existing in a server or site or other technical forum can't be treated as primary evidence by court though they are original. It should be amended and give the status of primary evidence.

Secondary Evidence (Section 63): This section provides provisions regarding secondary evidence. Like primary evidence, secondary evidence also covers the digital evidence.

Admissibility of Secondary Evidence (Section 65): This section should include evidence of the certified copies of digital or copies made from the original digital evidence by mechanical process or copies made from or compared with the original digital evidence or counterparts of digital evidence, oral accounts of the comments of

document given by some person who have himself seen it as secondary evidence admissible to the court of law.

Public and Private documents (Section 74-75): Section 74 defines the public and private documents. These should also include digital evidences under both sections. In accordance with other provisions related sections (76-90) regarding public and private documents should be modified.

Other Sections: Other sections of the Act should be amended in accordance with previous provisions where as necessary.

A Light of Hope:

The government has aimed to reach a 'Digital Bangladesh' within 2021 where the foundation of the national activities will be tech-based system. As the government has started such a journey, it has taken some worthy initiatives to digitize the legal system. Twenty courts of Sylhet have already been equipped with modern technologies.¹² Online GD filing,¹³ online cause list, uploading judgements of the supreme court etc. have advanced the journey toward digital Bangladesh. It is high time Bangladesh took initiatives for amending the hundred years old Evidence Act, 1872 standing 3years back from achieving the "Vision-2021." Moving toward a 'digital Bangladesh' skipping the rule of evidence which is a very critical part of both civil and criminal justice systems will hamper the ultimate philosophy of democracy as well as the objectives of Digital Bangladesh. This age of science and technology has influenced our legal system obviously. New forms of crimes are committed by offenders. As a growing legal system, if Bangladesh lags behind regarding the rule of evidence which is a very inalienable part of administration of justice, the whole system will be crying out due to failure to ensure proper justice to people.

¹² Syed Mohammad Abu Sayeed, 'Justice going digital', The Dhaka Tribune, available at www.dhakatribune.com/opinion/op-ed/2017/01/06/justice-going-digital , Last visited on 5 November, 2017

¹³ Samanta Shanaz Nowmi, A Financial Express article titled 'Filling GD or General Diary online', available at www.financialexpress.bd.com/2017/02/08/61321/filing-GD-or-General-Dairy-online-print , Last visited on 6 November, 2017