
ADMISSIBILITY OF PHONE RECORDINGS AND TAPE RECORDINGS IN EVIDENCE LAW

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INTRODUCTION

When it comes to evidence law, electronic evidence plays a major role. Electronic evidence includes phone recordings, tape recordings, messages, etc. These kinds of evidence, when seen through the eyes of a common man might seem admissible, but when we look at it from a legal perspective, the intricacies which are involved can be seen. In this research paper, I will try and decipher the code that relates to electronic evidence when it comes to phone recordings and tape recordings. I will look into their admissibility and whether electronic evidence taken through unsolicited ways can be said to be admissible in court or not.

LITERATURE REVIEW

RECORDINGS, TRANSCRIPTS, AND TRANSLATION AS EVIDENCE by Clifford S. Fishman

A law review article that discusses the nature and validity of the recordings and transcripts, as well as the history of their acceptance. The documents address the admissibility of the recording as well as the gaps in the transcript translation process. As a result, it made sense to learn that the court must comprehend the context of the audio recording and that careful consideration of all the available data is necessary before rendering a decision.

PHONE-TAPPING AND RECORDING OF A PHONE CONVERSATION: IS IT LEGAL AND ADMISSIBLE? by Bharat Chugh

This article explores whether it would be lawful for one party to record the other's discussion without that party's permission. The different statutes that control electronic evidence in India are added to this article. It also explains the logic behind the same's acceptability. This was crucial for the start of the investigation since it explained the significance of such evidence in

daily life and valued thinking. Furthermore, it explained how, in the absence of any restrictions, this evidence may have an impact on an individual's privacy.

LAWS ON PHONE TAPPING IN INDIA: IS PRIVACY AT STAKE? by Anisha Bhandari

Article 21 promotes the dignity of the individual and protects the right to privacy. The article discusses the extent to which public servants can violate an individual's right to privacy. The judicial approach to the conversation captured on tap is discussed in this article. It indicates that since privacy is at risk, the government should make sure that right is upheld. It was useful in identifying the shortcomings of that kind of proof.

OBJECTIVES OF THE STUDY

1. To analyze the evolution of the admissibility of tape-recorded evidence and phone-recorded evidence in India
2. To understand the nature and conditions of tape-recorded evidence.
3. To establish an idea on the evidentiary value of tape-recorded and phone-recorded evidence.
4. To identify problems which come with the admissibility of tape-recorded and phone-recorded evidence.
5. To understand the judicial interpretation of the admissibility of tape-recorded and phone-recorded evidence.

RESEARCH QUESTIONS

The research questions for my topic are as follows:

1. How did the admissibility of phone recordings and tape recordings evolve in India?
2. What is the nature of a phone-tapped recording and what conditions are laid down in courts?
3. Is tape-recorded evidence considered hearsay?

4. Is it legal to record a conversation between two individuals without their express consent?

HYPOTHESIS

When it comes to phone recordings and tape recordings, their evidentiary value is pretty strong and courts have time and again considered them as substantial pieces of evidence rather than hearsay. Tape recording a conversation between two people without their express consent is not violative of their right to privacy when the recording pertains to the commission of a crime and courts can admit these recordings as substantive pieces of evidence

CALL RECORDINGS AND RIGHT TO PRIVACY

In today's day and age, where the conversation between two persons happens primarily through phones, the question of whether recording someone's call to present them as evidence becomes one of great importance. In India, this issue is governed by a set of laws like the Indian Telegraph Act, of 1885, the Information Technology Act, of 2000, and the Indian Evidence Act, of 1872. But none of them is as important as that of Article 21¹ of the Constitution of India.

Article 21 of the Indian Constitution protects life and personal liberty, which is a blanket term, under which comes RIGHT TO PRIVACY. The privacy of an individual is of paramount importance, not only to the person himself, but also to the authorities, and hence, it is given as a fundamental right that cannot be infringed.

That being said, if there is a situation wherein an authority, may it be from the centre of the state, has been legally authorized, the conversation between two persons is no longer private and can be collected or restored as judicial evidence, or so has been laid down in various judgments through the years.

However, the above situation can only arise if the authorization given is for a matter of public emergency or public safety. This specific issue was highlighted in People's Union of Civil Liberties vs Union of India², in which it was laid down that recording someone's conversation, even secretly, is a grave violation of that person's right to privacy. The Validity of Section 5(2) of the Indian Telegraph Act, of 1885 was challenged, which gave powers to central and state

¹ Constitution of India

² (1997) 1 SCC 301

authorities in India to record the conversation between two individuals. The point being raised was that this law was purely against the sovereignty and security of the nation.

To safeguard the privacy of an individual, there were orders laid down in this judgment, which were:

- i. Orders for tapping of phones of individuals may be given by the home secretary of the central government or the state government. If they are not available, in that case, the order can also be given by an official of the home affairs of the centre or state, and a copy of that order must be given to a review committee within one week or less.
- ii. The authority which has made such a request, must see whether data that needs to be recovered can be taken through any other means.
- iii. The order under Section 5(2) of the Indian Telegram Act, shall be quashed within two months if it is not renewed. The total period of the operation of any such order shall not exceed six months.
- iv. The authority issuing such orders shall keep records of:
 - a. Intercepted communications.
 - b. Extent of the material disclosed.
 - c. No. of persons and identity to whom material is disclosed.
 - d. Extent of copied material
 - e. No. of copies made.
- v. The interceptions sent to one or more addresses specified in the order, i.e., an address or addresses likely to be used for transmission of communication, should be intercepted by Section 5(2) of the Indian Telegram Act, 1885.

- vi. The survey committee should consist of secretary-level officials which are both state and central-level persons. They can assess whether or not the interceptions are passed according to law and if they are not, they can save it and direct for the destruction of the intercepted copies.

Some other important cases are that of:

- a. **Vinit Kumar vs Central Bureau of Investigation and ors.**³ The Supreme Court dwelled on the admissibility of tape-recorded evidence. The court also highlights the fact that interceptions made should be by Rule 419A of the Indian Telegraph Rules, 1951.
- b. **K. S. Puttaswamy vs Union of India**⁴In another important case, the Supreme Court in held the “Principles of Proportionality and Legitimacy” to figure out whether call recording orders given by the government were legal or not. It was stated that the government had no business issuing orders for telephone tapping if there was no security threat to the public.

LEGALITY OF CALL RECORDING

When it comes to call recordings, there are no specific provisions or statutes, which indicate whether recording is illegal or not. This is one of the greatest voids in the Indian judiciary which needs to be addressed. The law that governs this grey area is not directly but rather indirectly mentioned in several provisions across various legislations. To understand all of these legislations, we need to first mention what these legislations are:

- 1) **The Indian Telegraph Act:** Under the Indian Telegraph Act, some provisions define what a telegram is, how it should be sent, and how it should be used.
 - a) **Section 3 (1AA):** telegraph means any appliance, instrument, material, or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual, or other

³ (2018) 5 SCC 1

⁴ (2017) 10 SCC 1

electromagnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.

This provision of the telegraph act puts into perspective the meaning of a telegraph. This broad definition includes any conversation made through the medium of a phone.

b) Section 5: Under section 5 of the Telegraph Act, the government, both state and central, has the power to intercept phone calls that they deem to be important. But the interceptions made must be made according to this provision only and interception of a phone call can only be made when there is a public emergency or the security of the people is at stake.

c) Section 25: This section deals with the interception of a telegraph to damage or destroy it. This section criminalizes the act of tampering or damaging any telegraph to intercept such telegraphs to acquire the message that is being sent.

2) The Information Technology Act: Under this act, the provisions provided are applicable for the same purpose as in section 25.

a) Section 2: This section of the IT Act lays down the definition of electronic records, which include sounds stored, received, or sent in electronic form.

b) Section 43A: This section provides for compensation provided to a person by a corporate entity if the person's personal information is leaked online by the corporation that uses the information of the person or the information of the person is stored in one of their servers gets leaked.

3) Additionally, under the Indian Evidence Act, Section 85B lays down the law regarding recorded evidence. It mentions that the authenticity and integrity of any electronic record is measured by a digital signature, which must be put in to sign any record of electronic nature.

Also, under the Indian Telegraph Rules 1951, Rule 419A lays down the procurement, review and interception process of an electronic record. This rule lays down the method under the process of review. It states that an order for interception under Section 5 of the

Indian Telegraph Act can only be issued by a person of the position of Union or State home secretary. The rule also states that when the interception process happens it can only happen within the enforcement agencies in India and the identity of the agency and the personnel involved must not be revealed to the public.

All the above-stated laws and legislations, even though drafted and enacted keeping in mind the safety and security of the nation, don't concretely lay down a process for interception of laws.

Under the Indian Evidence Act however, there are some other provisions as well which lay down the admissibility of electronic records, proof of electronic signatures, and proof of digital signatures. These sections include Section 65A, Section 65B, Section 67A, and Section 73A.

Admissibility of Call Recordings

In India, electronic evidence in the form of call recordings and tape recordings is relied upon heavily. But every time there comes the matter of whether electronic evidence is admissible or not. Section 65B of the Indian Evidence Act lays down the factors influencing the admissibility of electronic records. When someone documents the telephonic conversation of two persons without the permission of at least, any one of them, then the recording becomes invalid. This point can be true in most cases, but then comes a point of the "Fruits of Poisonous Tree", which states that the fruits of a tree which are poisonous will eventually contaminate the entire system.

In India, this law applies to only some extent, but the courts have no problem with admitting illegally obtained evidence. The only factor which comes into play is whether illegally obtained evidence is crucial evidence for the court and whether or not it has evidentiary value. The evidentiary value is anyways an important part of presenting any form of evidence to the court, but in cases of electronic evidence, it is the most important and it can be highlighted by some important judgements as well.

A) S Pratap Singh vs State of Punjab⁵

This is one of the cases in which the courts relied on electronic pieces of evidence. In

⁵ 1964 SCR (4) 733

this case, the conversation between two individuals was illegally obtained by the investigating authorities, and even though it was illegally obtained the court allowed the evidence just on the fact that they helped resolve the case. The parties contended on the point that the evidence obtained was through illegal means and hence should be discarded. But the Apex court held that just because evidence is obtained illegally, does not diminish the evidentiary value of that piece of evidence. It just makes it corroborative and if the evidence is so crucial that it will help resolve the case, then the courts have no problem in admitting them.

B) Ratan Tata vs Union of India and Ors.⁶

The telephonic recordings of Nira Radia were acquired by the investigating agencies and were leaked and published by a media house. This case was very prominent and is also known as the 2G scam case. The high court while examining whether or not the contents of the phone conversation between Mrs Radia and her associates were confidential or not, admitted this evidence based on an investigation by the Central Bureau of Investigation, which stated that since the tapes were authorized to be recorded, they could be accepted as shreds of evidence in the court. This case highlighted the aspect of whether or not an authorized telephonic conversation was a valid electronic record of evidence.

C) R.M. Malkani vs The State of Maharashtra⁷

This is another case which sheds light on the use of illegally and immorally obtained evidence. In this case, the admissibility of tape-recorded conversations for the prosecution of a person was raised. The evidences were illegally obtained and were not in line with the provisions of Section 25 of the Indian Telegraph Act. The parties contended that since the evidences were illegally obtained, they violated Articles 20 and 21 of the Indian Constitution. The court, however, had a different approach. It held that even though the Indian Telegraph Act was the most important when it came to tape recordings as pieces of evidence, the right to privacy of the Indian constitution only applies to citizens who are innocent, and not to individuals who are trying to dupe the government and the nation. This case revolved around a doctor, who, to escape criminal

⁶ (1998) 2 SCC 226

⁷ AIR 1973 SC 157

prosecution for the death of a person during an operation, tried to bribe the officials. The court held that the logic of fruits of poisonous trees will not apply here and illegally and immorally obtained evidence will still be included, even if they violate the Indian Telegraph Act and Article 21 of the Indian Constitution.

D) Ram Singh vs Colonel Ram Singh⁸

In this case, the Supreme Court took a different approach altogether. This case revolved around objections to terminating voting in some parts of a village. The issues were primarily on the admissibility of statements that were recorded in the toll booth. The Apex Court declared the tape recordings to be inadmissible. The court dismissed the appeal stating that the evidence provided in the recording did not have evidentiary value.

E) Rayala M Bhuvaneshwari vs Nagaphamendra Rayala⁹

This 2008 judgment is based on a divorce matter. In this case, the husband sought to divorce his wife based on calls he recorded of her having with some of her family members. The court, in this case, held that even though they may apply the logic of illegally and improperly obtained pieces of evidence in this case, it would not, because the relationship between a husband and wife is a sacred one, and no one has the right to record their partners' conversations which they have with their family members. The court held that it viewed the husband as a criminal and did not appreciate him using unconstitutional means to obtain evidence for a divorce. The court did not allow the shreds of evidence to be included.

DISCUSSIONS ON PHONE RECORDINGS

There is a lot of debate in the Indian courts surrounding phone recordings and tape recordings. Some of the points of these debates have been highlighted below:

- a) The government has a good justification to step in and use its phone-tapping powers if talks pose a threat to public safety or national security. Law enforcement officers and

⁸ 1985 SCC (SUPP) 611

⁹ (2010) 6 SCC 403

civil rights groups have long disagreed about the practice of listening in on or even recording another person's discussion.

- b) In a society where technology moves quickly, recording phone calls is commonplace since so many people utilize the extensive network of unprotected communication, indicating that few people are concerned about privacy. Nonetheless, freedom of expression and privacy are seen as basic human rights in India.
- c) The discussion around "phone tapping" makes clear the extent of the capabilities that governments have when it comes to enabling the unhindered enjoyment of the right to free speech and expression. The protection of individual liberty is the primary goal of the state.
- d) Additionally, if a court accepts a tape recording as evidence, there will inevitably be a loss of integrity, identity, and reputation because the evidence frequently contains private information that discloses details of a person's life that they would have preferred to keep private had someone not recorded the conversation.
- e) This discourse elucidates the extent of governmental authority in permitting the continuous enjoyment of the freedom of speech and expression. In a nation such as India, the media usually doesn't give a damn about privacy since they make their money by feeding the public rumour. Therefore, only a select few authorities—such as the police or government-authorized agencies—have the authority to record calls in the event of a privacy infringement. Ensuring individual liberty and security ought to be the primary goals of the government.
- f) The main goal of using phone tape recordings of talks is to produce proof of another person's statements or deeds. Although anybody can record something, the government and other high-ranking officials typically do so to divulge information that would aid in ensuring that the courts receive justice. Whether or not a call is recorded with consent is another important factor to consider.
- g) One-way consent and two-way consent for call recording are the two primary categories into which the phrase "consent" falls. One-way refers to a single consenting party for the call recording, as the terms themselves imply. When a call

recording is two-way, both parties must approve it. The terms of permission make the validity of electronic call records clear. Therefore, it is imperative to protect an individual's privacy. Certain states, like California, Massachusetts, and Washington, have laws requiring two-party consent. A few states that just need one-party permission are West Virginia, Texas, Hawaii, Alabama, and Hawaii. It follows that getting permission before recording someone's call is given.

CONCLUSION AND SUGGESTIONS

Call recordings may be admitted into evidence in Indian courts based on some criteria, such as the recordings' veracity, legitimacy, and correctness as well as their applicability and probative value to the case at hand and the conditions under which they were created. To decide whether call recordings are admissible, the Supreme Court of India has established rules and guidelines, which have been interpreted in many instances by subordinate courts. The admissibility of electronic evidence, including phone recordings, will probably always be up for court review and interpretation as long as technology is developing.

Privacy rights are frequently raised by the admission of technological evidence, including video clips and recorded phone calls. Although electronic evidence can be admitted in court, it is illegal for anyone to record talks without permission because doing so violates their right to privacy under Article 21 of the Indian Constitution 1950 and raises the possibility that the recording will be used in criminal activity. The judiciary has underscored that the use of recorded talks as a proof is limited to instances when they facilitate case resolution and guarantee the triumph of criminal charges.

The much-anticipated Draft Personal Data Protection Bill, 2018 (DPP Bill) has been introduced, with implications for data privacy that will be addressed. The Puttaswamy ruling set a lot of the foundation for India's privacy laws. India is currently at a key point in its efforts to establish a robust data privacy policy with the introduction of the DPP Bill.

The paradigm of the interaction between service providers and consumers is altered by the DPP Bill. The connection is elevated to a fiduciary level by this legislation, which incorporates constitutional precepts, such as the right to privacy, and is based on the essential expectation of trust. To reduce the disparity in negotiating power, the nomenclature has been modified. The entity collecting the data as the "data controller" is the "data fiduciary," and the person whose

data is being gathered as the "data subject" is now the "data principal". Returning to the original topic, the DPP Bill's current phrasing leaves open the question of whether it would encompass the secret recording of a phone call by one side while the other is unaware of it. Whether the concepts of "data fiduciary" and "data principal" were meant to apply to private, arm's-length interactions between two people is unclear.