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# **A CRITICAL STUDY ON EVIDENTIARY VALUE OF TAPE-RECORDED CONVERSATION**

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Abhijeet Mishra, Symbiosis Law School, Hyderabad

## **ABSTRACT**

In today's era, people have shifted to the electronic device, starting from phone to lending of money. Globalization has not only aided to the society but also increased the ranges and variety of crime. People confined in a four walled room are doing heinous crimes and there is little to no scope in identifying the witness. Bribery, cyber-bullying, forgery is planned through electronic medium. In order to prevent it, the governmental officials have discretionary power to check and identify the crimes through tape recordings. Have you ever been a victim of phone tapped recording or has someone threatened you to reveal or post your conversation? The question arises if phone tapped recordings can be produced before the court and what is the evidentiary value of such evidence. The researcher through this research tries to understand the admissibility of phone tapped recording and its evidentiary value.

Keywords: Forgery, Discretionary, Phone-tapped-recording, Admissibility, Evidentiary

## **INTRODUCTION**

With advent of new technology, the right to privacy can easily be invaded through few clicks via surfing on the internet. Cyber-bullying, cybercrimes are newer forms of offence that has seen growth in this 21<sup>st</sup> century. The legal system in our nation has adapted the new era of technology and tries to change itself as the technology evolves through generation. The same can be laid down in case of Law of Evidence, the judiciary has admitted the growth of new possible crimes and recognized electronic evidence as admissible with certain exceptions.

Tape recording falls under the criterion of documentation of evidentiary value, which is collected through the magnetic tapes or digital multimedia devices. The practise of presenting tape-recorded conversations as evidence in law courts has seen a fundamental rise, especially under the cases of preventing corruption and criminal conspiracy. The criminal courts have addressed the usage of the tape recording in various cases from bribery to planning of crimes. In the similar view, civil courts have used tape recorded evidence to support or identify the offender and victim. Before the amendment of Information Technology Act, the Indian Evidence Act mainly dealt with oral and documentary evidence. There is no value of electronic evidence or evidence recorded through electro-magnetic devices, as the admissibility and evidentiary value were questioned, and nature was criticized. There was only Telegraph Act, 1885 that directed tampering or damaging of telegraph would lead offence. The court reasoned that it would be incorrect to deny to the law of evidence advantages obtained by new techniques and devises.

## **RESEARCH OBJECTIVE**

- To analyse the evolution of admissibility of tape-recorded evidence in India.
- To understand the nature and conditions of tape-recorded evidence.
- To establish a general idea on evidentiary value of tape-recorded evidence.
- To identify the loopholes of the admissibility of tape-recorded conversation.
- To understand the judicial interpretation on the admissibility of such evidence.

## **RESEARCH QUESTION**

- How did the admissibility of phone tape recording evolve in India?

- What is the nature of the phone tapped recordings and what are conditions to be fulfilled before courts?
- Is tape recorded evidence hearsay or res gestae?
- Is it illegal to record a conversation without the consent of the other party? If not, doesn't it violate the right to privacy?

## **RESEARCH METHODOLOGY**

For the goal of the study, the researcher used doctrinal and analytical form of research methodology. Websites and sources available on an internet platform were used as primary data sources. Secondary data sources included journals, papers, books, and a variety of other sites. Relevant resources for data analysis and interpretation were gathered. Pure analytics was employed to comprehend and determine the evidentiary value of the tape-recorded evidence. The analysis of primary and secondary sources was critical to the completion of the research. Finally, the judicial interpretation was laid down for better understanding of the concept and a few suggestions were put forward.

## **LIMITATION**

The research lacks in detailed analysis of the international laws regarding the admissibility of the tape-recorded evidence. It also fails to provide detailed information on how the right to privacy is hampered. Due to limited range of literature, the researcher couldn't analyse deeply the other provision such as Telegraph Act. The research failed to produce more information on electronic evidence, as evidentiary value of electronic evidence is vast topic to explore.

## **LITERATURE REVIEW**

### **RECORDINGS, TRANSCRIPTS AND TRANSLATION AS EVIDENCE <sup>1</sup> by Clifford S. Fishman**

A law review material that highlights the history of admissibility of recordings and transcripts, it talks about the nature and authenticity of the recording and transcripts. The materials deals on how the recording can be admissible and what are the loopholes while translation of the transcript. Thus, it helped to understand how the court needs to understand the context of the

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<sup>1</sup> Clifford S. Fishman, *Recordings, Transcripts and Translations as Evidence*, 81 WASH. L.REV. 473 (2006)

recorded conversation and evidence should be analyzed thoroughly before coming to the judgement.

### **PHONE-TAPPING AND RECORDING OF A PHONE CONVERSATION: IS IT LEGAL AND ADMISSIBLE?<sup>2</sup> by Bharat Chugh**

This is an article determining if one party records the conversation of the other without the consent of other party, would it be considered legal? This article adds the various statutes that govern the electronic evidence in India. It also states the reasoning of admissibility of the same. This was important for the commencement of research as it valued for reasoning and also described the importance of such evidence in day-to-day basis. Moreover, it stated how this evidence can affect the privacy of the individual, if there is no limitation of generating such evidence.

### **LAWS ON PHONE TAPPING IN INDIA: IS PRIVACY AT STAKE?<sup>3</sup> by Anisha Bhandari**

Article 21 safeguards the right to privacy and fosters the nobleness of the individual. The article talks about the ultimate power of government officials in invading the right to privacy of common citizen. This article talks about judicial approach towards the tapped recording conversation. It suggests the government to ensure the right is privacy is maintained as the privacy are stake. It was helpful in determining the flaws of such evidence.

### **EVOLUTION OF TAPE RECORDINGS: ADMISSIBILITY OF SUCH EVIDENCE**

Oral and documentary evidence were under the purview of Indian Evidence Act, 1872. In those earlier periods of time, there was no recognition of advanced technology. Eventually through decades, photographs were realised and were admissible as direct evidence. By enactment of the Information Technology Act, CCTV footages, information stored in computer or electronic devices and recorded conversation played a crucial role in identify the facts of the case. Many offences, such as corruption, bribing etc., are operated inside an opaque room or secretly,

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<sup>2</sup> *Phone-tapping and Recording of a Phone conversation: Is it legal and admissible?*, BHARATCHUGH, (Mar 18, 2022 10:31PM)

<https://bharatchugh.in/2020/07/05/phone-tapping-and-recording-of-a-phone-conversation-by-a-private-party-issues-relating-to-legality-and-admissibility/>

<sup>3</sup> Anisha Bhandari, *LAWS ON PHONE TAPPING IN INDIA: IS PRIVACY AT STAKE?* OXFORDUNIMEDIA (Mar 20, 2022 10:45PM)

<https://www.oxfordunimediasoc.com/blog/2021/1/24/laws-on-phone-tapping-in-india-is-privacy-at-stake>

making it difficult to obtain evidence. Thus, it has led to usage of telephone tapping and phone recording conversation for gathering the first hand information or proof of the offence. The issue which lies here are the nature and admissibility of such tape recording, the recording if illegally obtained or doesn't have any relevant context to the case and is manipulated, then the credibility of such conversation be zero. The judiciary also looked upon this matter, as there is scarce of direct evidence in such cases, thus there is importance of tape-recording evidence but there is need to devise principles and guidelines for such questions given their importance in such matter.

One of the foremost and earliest cases with regard to addressing the admissibility of tape recorded evidence was observed in the case of *Rup Chand v. Mahabir Parshad*, "The court in this case declined to treat tape-recorded conversation as writing within the meaning of section 65(3) of the General Clauses Act, as it interpreted writing as representing or reproducing words in a visible form and it stated that the record which appears on a tape-recorder, could not fall within the ambit of this definition."<sup>4</sup> The admissibility of tape recorded evidence was denied under "Sec. 145 of Indian Evidence Act."<sup>5</sup> But it was allowed for credentials in favour of witness under "Sec. 155(3) of the Act."<sup>6</sup> Thus it can be stated that merely not falling under the category of writing couldn't declare the tape recording as inadmissible. However, the verdict can not only be relied on the recorded conversation. Meaning, tape recording has values and credentials in the case, but can't be called on their own as sufficient evidence to change the outcome of a case.

In the famous case of *Yusufali E. Nagree v. State of Maharashtra*, there was an argument regarding the admission of guilt against the accused can't be admitted as it violated the Article 20(3) of Indian Constitution. The police set up a trap and capture the discussion made by the offender through tape recorder, who was proposing a bribe to the surgeon, who was about to report the offence of guilty. "The Supreme Court ruled that the accused could not claim protection under Article 20(3) on the basis of deceit since he had not been compelled to testify against himself."<sup>7</sup> In this landmark case, the court held that tape recording process is an accurate form of interpreting the relevant incident or storing the relevant information of incident and should have evidentiary value, until and unless there is has been manipulation in

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<sup>4</sup> *Rup Chand v. Mahabir Parshad and Anr*, AIR 1956 P H 173

<sup>5</sup> Indian Evidence Act, 1872 § 145

<sup>6</sup> Indian Evidence Act, 1872 § 155(3)

<sup>7</sup> *Yusufali Esmail Nagree vs The State Of Maharashtra*, 1968 AIR 147

the recording material or there is no any relevant connection to the incident. Thus, it is admissible under the Section 7 of Indian Evidence Act. In the case of *R.M. Malkani v. State of Maharashtra*, similar view was taken for consideration, “A contemporaneous tape record of a pertinent discussion is a relevant fact that can be used in court under Section 8 of the Evidence Act.”<sup>8</sup> It's also similar to an image of a pertinent occasion. “As a result, the taped discussion constitutes a material fact and is admissible under Section 7 of the Evidence Act.”<sup>9</sup>

## **NATURE**

A tape-recorded conversation is a form of storing the voice-samples on a magnetic medium. However, in the case of *Rupchand*, “Punjab High Court declined to treat tape recorded conversations as writing within the meaning of section 3 (65) of the General Clauses Act”<sup>10</sup>. It was later recognized as documents in the *Ziyauddin Burhanuddin Bukhar*, the court held that tape recorded conversation were “documents as defined by section 3 of the Evidence Act, which stood on no different footing than photographs.”<sup>11</sup>

The Section 25 of Indian Telegraph Act, 1885 stated that “the offence includes the act of tampering a telegraph or the working of a telegraph with the intention of intercepting or acquainting oneself with the contents of any message”<sup>12</sup> It was the first time the tape-recorded conversation were regarded as similar to that of telegraph. After the enactment of Information Technology Act, 2000, electronic evidence came into consideration and now the tape-recorded conversation was under purview of electronic evidences. It was later confirmed through the Section 65(A) with provision 65(B) of Indian Evidence Act, that the tape-recorded conversation could now be admissible in court if it had relevancy and authenticity. Though in general, the advancement of such evidence is done through judicial approaches.

“From the aforesaid provisions it becomes amply clear that the law, as it prevails today, takes care of information stored on magnetic or electronic device and treats it as documentary evidence within the meaning of section 3 of the Indian Evidence Act.”<sup>13</sup>

## **CONDITIONS FOR ADMISSIBILITY OF TAPE-RECORDED EVIDENCE**

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<sup>8</sup> *R. M. Malkani vs State Of Maharashtra*, 1973 AIR 157

<sup>9</sup> *Supra* note at 4

<sup>10</sup> *Ziyauddin Burhanuddin Bukhari vs Brijmohan Ramdass Mehra & Ors*, 1975 AIR 1778

<sup>11</sup> Indian Evidence Act, 1872 § 3

<sup>12</sup> Indian Telegraph Act, 1885 § 25

<sup>13</sup> Information Technology Act, 2000

The recorded sample of a tape-recorded conversation can be easily tampered, manipulated or erased and inserted. This is the major issue which lies under the recorded evidence, any sort of unfair and manipulation in the sample would directly affect the verdict of the case. Finally, if there is a well-founded suspicion, not to mention proof, that the tape recording has been tampered with, the court has a legitimate reason to dismiss its whole evidential value. The court deciding on the case of “*Rama Reddy and Ors. v. V.V. Giri*”<sup>14</sup>, stated that tape recordings are the first-hand information of the incident, if there is true value of recording that gives accurate evidence without any manipulation, then its evidentiary value would be admissible. However, the issues lie on the corresponding matter while valuing the evidences. The Apex Court, while deciding on the matter of “*Ram Singh v. Col. Ram Singh*,”<sup>15</sup> laid down various conditions for admissibility of tape-recorded conversation as follows: -

- The speaker's voice must be properly identified by the creator of the recording or by others who know his voice. Where the recorded speaker has rejected the voice, an extremely stringent proof will be required to decide whether or not it was indeed the speaker's voice.
- Only by the means of direct or circumstantial evidence, the maker has to prove the validity of the recorded conversation.
- Usage of any unfair means to tamper the recorded statements, would lose all the credentials of the recorded materials and hence be inadmissible.
- The recorded conversation must be in context to the case and rules of Indian Evidence Act.
- “The recorded cassette must be carefully sealed and kept in safe or official custody.”<sup>16</sup>
- There should be clarity in the speaker’s voice, should be easily detectable any distort or disturbance sounds could lead to inadmissible of the recording.

**Other Important conditions for satisfying the admissibility of tape-recorded statements:**

a. Identifying the voice of the parties:

When it comes to understanding the accuracy of the statement, first and foremost concern is to identify if the voices of the parties or speaker to be true or real. “The

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<sup>14</sup> Shri N. Sri Rama Reddy Etc vs Shri V. V. Giri, 1971 AIR 1162

<sup>15</sup> Ram Singh & Ors vs Col. Ram Slngh, 1986 AIR 3

<sup>16</sup> Vinitha Tripathi, *Evidentiary Value of Tape Recorded Conversation*, SCRIBD (Mar 20, 2022, 10:30AM)

<https://www.scribd.com/document/410251041/Law-of-Evidence>

correct identification of the recorded voice is a sine qua non for the usage of the taped sound, such that the time, location and reliability of the recording must be determined by the qualified witness and the sounds should be correctly recognized.”<sup>17</sup>

b. Transcript

It is defined as written or printed of the original material presented in another medium. It is impossible to dismiss the relevance of releasing a transcript of the tape-recorded conversation since it indicates that the audio was not subsequently tampered with. The use of transcript of a tape-recorded conversation raises issue of accuracy, admissibility and presentation. It is difficult for anyone to analyse the context of the speakers and most importantly how the accuracy of the statements can be valued. What should the jury decide while reading transcript? In the case of Ramdas Mehta, it was held that the opinion the transcriptionist has found after translation, should be used to denote the corroborative evidence. Thus, Apex court made it clear that as per “Section 159 of Evidence Act”<sup>18</sup>, the transcript helps the parties of the recorded conversation to recollect the incidents and give it in as direct oral evidence as mentioned in “Section 160 of this Act”<sup>19</sup>.

## EVIDENTIARY VALUE OF TAPE RECORDING

While determining the evidentiary value or utility of the tape-recorded information, the following questions rises: -

a. If the evidence obtained through electro-magnetic device is primary or secondary

The case of V.V Giri, suggested that the tape-recorded evidence is the first-hand information of the incident and must be treated as primary and direct evidence. The court held that, the conversation by stated by the parties connected to the case and the speaker said the facts and it was received by the receiving party. Hence there is no involvement of any third party. Both the parties where present in a conversation. This was recapitulated in the case of R.K. Malkani too, the court stated when a conversation is recorded and audited later, then it can be said that the

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<sup>17</sup> supra note at 1

<sup>18</sup> Indian Evidence Act, 1872 § 159

<sup>19</sup> Indian Evidence Act, 1872 § 160



events of the incident were reproduced and hence be termed as relevant if there hasn't been any imposition or cuts of samples in the recorded material.

b. If the evidence obtained through tape recorded material is *res gestae* or hearsay

Before going into the type of evidence, it is important to understand the material and legitimacy of the tape recordings. The two material concepts and the veracity of the recordings have invariably been misunderstood while deciding on the judgements of illegally obtained evidence. While deciding the case of *Magraj Patodia*, it was stated, "The fact that a record was produced through unethical or even illegal means is not a barrier to its validity if it is appropriate and authentic. However, the conditions in which it appeared to be presented in court must be kept in mind when reviewing the evidence provided as to its authenticity"<sup>20</sup>.

When the court hears a recording, it tries to testify the authenticity and relevancy of the materials. The materials of tape recording have to be relevant to the subject matter of the case, if the court validates the reasonableness of the recording, then it can be used as decider to the case. This appears to violate the ideas of hearsay, because the most typical issue cited when proof of hearsay is offered is that it has not been utilised to determine the authenticity of its content.

When the court dilates the tape recording, its utmost factor is to identify two things: -

- a. The first is to understand, if the speakers are authentic and legitimate.
- b. The latter is to know the motive behind the conversation, to frame an understanding about how the incident was planned or made.

In this case, tape-recorded testimony was utilised to cross-examine a witness. When the tribunal explicitly determined that the recording could to understand the events and decide on the matter as well to examine the motive of the offender, any remaining ambiguity about whether it could be used to oppose the witness was removed. The court upheld in subsequent case, a tape can only be confirming evidence and can't act on its own as sufficient evidence in such case, where there is absence of any other proof of the contact. Section 91 of the Indian Evidence Act makes recorded evidence holy. "If the recording is considered as true evidence, the exclusionary rule of documented evidence will not be enforced." Furthermore, if the tape is presented for valuation, the material legitimacy stalemate must first be resolved. It may be easier to take it

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<sup>20</sup> *Magraj Patodia vs R. K. Birla And Ors*, 1971 AIR 1295

as true facts rather than as a paper. The issues arise here is the evidence has to be classified as *res gestae* in order to be regarded as real evidence.

The hypothesis of hearsay, on the other hand, remains largely unexplained. It is important to notice that the level of proof does not differ between a person who recorded the debate and who heard the same conversation. The evidence presented by such a person is definitely hearsay. As a result, it must be omitted. If that is the situation, the tape may also be prohibited and declared null. "It can only be allowed if an exemption to the rule of hearsay is made, as was done for dying declaration and *res gestae* issues."<sup>21</sup>

### **JUDICIAL APPROACH TO ADMISSIBILITY OF TAPE RECORDINGS**

Ever since its inception, the evidentiary value of the tape-recording evidence has undergone debates. At one end, it has been heavily criticized and at the same time been in favour of the guidelines via accepting the recent changes in the formulation of electronic evidence. Here are the landmark cases that have helped in the evolution and recognition of such postulates.

"R.M. Malkani v. State of Maharashtra"<sup>22</sup>

Here the question centred on the subject of whether a person would be liable to face criminal charges on some damning aspects of a phone call which he had with another person. The appellant was residing in Mumbai and wanted a forgery case, "where he attempting to accept illicit gratuity in the amount of Rs. 15,000 from an honest doctor." He planned to accuse the doctor with a false case for being negligent in operation. The doctor wasn't ready to accept bribery and instead contacted with police issuing criminal offence. The police had used tape recorded machines to analyse the conversation. The appellant had a conversation with the doctor and stated him to donate the amount and place of location etc.

The police took him to custody for bribery offence. The Supreme Court held that, the tapping of phone by the police didn't amount to coercion and there was no compulsion which would lead to altering or impacting the outcome. The court decided that there was no violation of the Act, however it entertained that the procedure set up was illegal as it violates the right to privacy

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<sup>21</sup> Akhilesh Shah, *Whether Compact Disc, Tape Recorded Conversation Is A Document And Admissible As An Evidenc*, ITATONLINE (Mar, 20 10:40AM)

[https://itatonline.org/articles\\_new/whether-compact-disc-tape-recorded-conversation-is-a-document-and-admissible-as-an-evidence/](https://itatonline.org/articles_new/whether-compact-disc-tape-recorded-conversation-is-a-document-and-admissible-as-an-evidence/)

<sup>22</sup> supra note at 8

of individuals. The court added, eavesdropping or phone tapping shouldn't be evidence that can act on itself and necessarily will not be the only evidence for declaring someone guilty or innocent. Only government officials have the authority to phone tap but it should be done in a proper manner with circumspection. The tape-recorded evidence was matched to a photograph of a relevant occurrence, and "it was determined that Sections 7 and 8 of the Evidence Act, 1872 would not exclude the inclusion of fraudulently obtained evidence."<sup>23</sup>

"Justice Puttaswamy v. Union of India"<sup>24</sup>

The Supreme Court ruled that privacy is not an absolute right. It is a fundamental right that includes both physical and private information. It further said that privacy is viewed as a right controlled by the legal system. Anyone can establish the legitimacy of such restraint by following fair procedural method on devoid of arbitrariness. However, such evidence are permissible in the court due to the fact that the fundamental right is not absolute.

## CONCLUSION AND SUGGESTIONS

Due to globalization and industrialization, the judiciary has recognized the new forms of electronic evidence. The admissibility of a tape-recorded evidence varies according to case because the precision it contains, thereby eliminating the sample of the record or tampering it with imposing sample to original. A tape-recorded evidence is admissible under Sections 7 and 8 of the Evidence Act, if it adds value to pertinent facts and matches to the image of the alleged occurrence. The court considers the possibility of a tape recording being changed while determining admissibility. The conditions mentioned above have to be mandated in order to have evidentiary value of the recording. The issue of admissibility arises when the recorded material is produced before the court. The court has the authority to reject such evidence if certain time frame has been passed or if the authenticity or connectivity to the case is nil or unsatisfactory.

One of the beneficial and effective improvements brought about by the advancement of technology is the use of tape-recorded conversations as evidence in court. The Indian Evidence Act does not clarify on this form of evidence, adding to its uncertainty. Some changes have

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<sup>23</sup> Kartik Bhargava, *CCTV FOOTAGES AND THEIR ADMISSIBILITY AND RELEVANCY*, SCRIBD (Mar 20, 2022, 10:30AM)

<https://www.scribd.com/document/486950778/LAW-OF-EVIDENCE-PROJECT>

<sup>24</sup> Justice K.S.Puttaswamy(Retd) vs Union Of India, (2017) 10 SCC 1

been made, but more are needed owing to developments in the domains of cyber law, the Information Technology Act, and so on. All the advancements and information relating to tape recorded evidence are explained through court judgements. It is unclear, that recording a phone call by a party to the conversation without the consent of the opposing side constitutes a crime, and this has not been decided by a court. There do not appear to have been any documented prosecutions initiated against a party to the discussion for violating the Telegraph Act. Section 25 of the Telegraph Act, as well as the relevant sections of the IT Act, do not suggest simple recording of a phone call by one of the parties without the consent is unlawful or not. However, when the parties couldn't consent for the same, it violates the right to privacy of that person. The court also permits illegally obtained recordings admissible if it has authenticity to the case. Thus, the issue is right to privacy is hampered with inclusion of evidentiary value of tapped recording. The law makers should analyse the situation better so that the fundamental right of the citizen isn't violated, and the justice is delivered in just and fair manner.

Law makers and the courts must look upon dangers of giving the Public Prosecutor broad discretionary powers to intervene in citizen's privacy, as this could be immoral, affecting the private related issues such as sanctity of marital relationship, the confidentiality of business, and violating the principle of fairness. The researcher would conclude by suggesting that the government should have strong hold and minimize the illegal access, have a time frame on retention of data. This would stabilize the shortcomings and help for a better life without the fear of fundamental rights being violated.

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