Admissibility of Evidence Produced Via Modern Devices and Techniques: A Look in Pakistani Prospective.

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1.1. Abstract:

The time flies and had approached an era where every walk of life is being surrounded by Computer and other allied techniques. The evidence collected through modern computer devices was admissible in evidence in many developed legal systems but study of judgments and decisions of apex courts of Pakistan transpires that the law of evidence in Pakistan has also widely allowed decisions of cases on evidence collected and generated through modern devices. However, there are some valuable techniques i.e polygraph test and FMRI which are not honored by Pakistani legal system to produce admissible evidence so Pakistan shall build laboratories and judges shall have to establish a judicial mind set in order to utilize evidence gathered through modern devices. This article is analysis of judicial dictums of Pakistani Apex Courts before the Judge Arshad Malik's video scandal's case titled Istiaq Ahmad Mirza vs Federation of Pakistan (PLD 2019 SC 675) regarding the admissibility of scientific evidence of different kinds.

1.2. Key words:

Evidence; Computer; DNA; Modern techniques; Audio; Video

1.3. Introduction:

Evidence means any statement recorded or document produced before a court of law¹, it also includes electronic documents.² An admissible evidence is that evidence which may be used by

¹ Art. 2 (c), Qanoon e Shahdat Order, 1984. See also Section 3(16) of General Clauses Act, 1897

² Art. 3, The Electronic Transactions Ordinance, 2002

a judge to draw a conclusive inference in a case.

The definition of a “proved fact” as envisaged in Article 2(4) of the qanoon provides a two-fold definition of the same. Firstly, when the court itself is satisfied that a certain fact is in existence and secondly, if the court opts that a man of a general prudence would come to a probable conclusion that the fact exist, it stands proved. Similarly, a fact is disproved if the court considers that a fact is not in existence or a man of ordinary prudence may infer that the fact in certain circumstances do not exists.³ So, it can be asserted that a positive possibility do also prove a fact and physical proof is not necessarily required.⁴ So, if there is a reasonable probability a fact may shall either be proved or in any other case be disproved. In Ishtiaq Ahmad Mirza Case⁵ the August Supreme court has set as many as 21 standards to get and audio/ video evidence be admissible in evidence. It seems to be a clear deviation from statutory definition of proof of a fact or disproval of a fact, as the case may be. Thus the scientific evidence in Pakistan is a weak type of evidence and courts in Pakistan has far and against approach regarding the scientific evidence.

Article 164 of the Qanoon e Shahadat Order, 1984 in its letter and spirit accept the admissibility of evidence that become available through the modern devices and techniques. Ibid article allows the court to use the evidence made available through the modern devices and to allow the court to produce such evidence if the court thinks appropriate. Evidence produced through modern devices is primary evidence within meanings of Art.73 of Qanoon e Shahadat Order, 1984.⁶ The Phrase

³ Art. 2 (5), Qanoon e Shahdat Order, 1984

⁴ 2010 CLC 1477 See also 2010 CLD 920.

⁵ PLD 2019 SC 675

⁶ PLD 2015 Lah 231

“Modern devices and Techniques” was first time used by *Justice John Morsh* in leading case “*Rex vs Maqsood Ali*”⁷ in 1965, as this concept was not available in Evidence Act, 1872. Device is a thing made or adapted for special purpose,⁸ a method or a particular design may be termed as technique.⁹ When we refer to modern technique and devices computer is well within this ambit.¹⁰ Prevention of Electronic Crimes Act, 2016, while defining the terms “device” used the phrases “virtual tools i.e not in physical form, passwords, access codes in electronic form” etc, it means not only computer but a virtual universe resulting due to use of computer may also be included in “modern devices and techniques” thus computer and its derivatives are modern techniques and devices are covered of Art. 164 QSO, 1984.

1.4. Admissibility of Scientific Evidence in Pakistan:

Judicial system of Pakistan, as discussed supra, is widely accepts the scientific evidence, however, these modern techniques and devices, are subject to tempering thus court may discount its evidentiary value if it deems that there is tempering in such device and technique¹¹. Courts shall also be conscious of mimicry while accepting audios and Photoshop technique while admitting photographs in evidence.¹²

In Pakistan following scientific evidence and modern techniques has been admissible and used in the judicial system of Pakistan.

⁷ AIR 1965 2 ALL 464

⁸ *The Australian Oxford Dictionary, 2nd Ed.* (2004). Melbourne: Oxford University Press

⁹ *ibid*

¹⁰ PLJ 2002 Lah 159

¹¹ *S Partab Singh vs State of Punjab*

¹² 1998 PCRLJ 1009

1.4.1. Tape Recorder:

Tape recorder conversation or speech are admissible as evidence¹³ audio cassette can be produced and be relied upon by a court of law¹⁴ it can only be proved by a person making such recording¹⁵, however corroboration is required to prove the same.¹⁶ Tape record and transcript shall be prepared under independent supervision and voice of the person sought shall be dully identified otherwise cannot be appreciated in evidence.¹⁷ Audio cassette recordings are admissible in evidence subject to open questions upon its credibility in the trial court.¹⁸

1.4.2. Video Cassette:

Video cassette,¹⁹ as it is expressed through figures and marks thus is admissible in evidence²⁰ but this is not a general rule, video screenings are admissible in some cases but not in all cases.²¹ CCTV footage can also be admitted in evidence but it cannot be appreciated unless proved,²² superior courts of country have set forth principles to prove the video recording. It can be proved by producing the person recording it or by his affidavit of the fact of recording the same.²³ Although

¹³ 2000 CRLJ 755

¹⁴ 2016 YLR 62 Karachi

¹⁵ PLJ 1976 SC 72

¹⁶ 1995 MLD 1485

¹⁷ 1986 CLC 1786

¹⁸ PLD 1982 PESH 52

¹⁹ 1999 MLD 2989

²⁰ 2002 PCRLJ 1765

²¹ PLD 1989 SC 249

²² PLD 2016 SC 2084

²³ 2001 YLR 448

video footage and recordings has been held admissible in the evidence yet the courts are not advised to appreciate the same at bail stage as it might be an outcome of some camera trick²⁴ and at bail stage deeper appreciation is prohibited and video recording can only be considered at trial stage. Statements of the witnesses can also be recorded through video link under the ambit of Article 164.²⁵

1.4.3. Press clippings and Press Reports:

In Benazir Bhutto's²⁶ as well as Mian Shahbaz Sharief's²⁷ case Supreme Court of Pakistan held that Press reports and clippings are admissible in evidence subject to exceptions and recently Islamabad High Court has also counted press clippings as evidence.²⁸ Authentic and uncontradictory news published in newspaper can be made basis for inferences and opinions,²⁹ these reports are also admissible if not contradicted immediately after publication.³⁰ Courts are empowered to take judicial notice of print and electronic media reports for forming opinion.³¹ Reports of facts received through fax are also admissible in evidence.³²

²⁴ 1998 PCRLJ 1990

²⁵ 2020 PCRLJ 1184

²⁶ PLD 1998 SC 388

²⁷ PLD 2004 SC 583

²⁸ PLD 2015 ISB 85

²⁹ PLD 1998 SC 388

³⁰ PLJ 1998 SC 27

³¹ PLD 2009 SC 879

³² PLD 2003 Lah 213

1.4.4. Photographs:

Photographs falls in the preview of document³³ admissible in evidence but the presenter has to prove that the same has not been tempered or maneuvered³⁴ but mere production of the photographs can't be exclusively accepted as a proof of fact.³⁵ Photocopies of the documents can only be admitted in evidence if specifically permitted by court.

1.4.5. Compact Disk:

Compact disk (CD) is also a modern device to transmit information in the ambit of Art. 164. As reported in BBC news CD was commercially published in market in year 1982 in Japan. CD can be admitted in evidence;³⁶ it can be used in proceeding to determine liability of the accused.³⁷ USB device can also be used as an admissible evidence.

1.4.6. Positioning Systems:

Geo fencing is software that uses GPS (Global Positioning System) or RFID (Radio-frequency identification) to define geographical boundaries.³⁸ Courts in Pakistan recognize geo fencing as well as geo tracking as evidence.

³³ 2002 PCRLJ 1765

³⁴ PLD 2003 Kar 148

³⁵ 1990 CLC 331

³⁶ 2008 MLD 1442

³⁷ 2016 PCRLJ 1390

³⁸ Definition of Geo Fencing: <http://www.whatis.techtarget.com/definition/geofencing> retrieved on 11/10/18

1.4.7. Polygraph test:

Polygraph test also referred to as lie detector, first invented by John A. Larson in the year 1921, is a procedure that measures physiological indicators while answering certain questions. Polygraph test are admissible in modern systems but if conducted with reasonable caution and care but in scenario of Pakistan polygraph test cannot be relied upon as a conclusive proof of the fact and of no avail to prosecution.³⁹

1.4.8. Telephonic Information:

The information through telephone i.e SMS is also admissible in evidence⁴⁰ however the same shall be proved in accordance with law similarly the communication through email can also be appreciated in evidence⁴¹ but this rule is not applicable in case of *talabs* (demands) in a suit for pre-emption.⁴² Similarly, the fax also comes in the ambit of article 164⁴³ thus the fax reports can also be used as an evidence.

Call data record (CDR) of the accused can be made basis for the best inference of a case. CDR of such a SIM which is not in the name of the accused can hardly be used in favor of the prosecution.⁴⁴

The CDR shall have to be signed by the authorize officer of the company providing the same, in

³⁹ 2008 MLD 1385

⁴⁰ PLD 2015 Lah 231

⁴¹ 2007 PCRLJ 675

⁴² 2014 YLR 1046

⁴³ PLD 2003 Lahore 213

⁴⁴ 2018 PCRLJ 1465

any other case the same shall not be availed.⁴⁵

1.4.9. DNA Profiling:

DNA (DEOXYRIBONUCLEIC ACID) report is admissible in evidence as it is a report of chemical examiner and is an outcome of modern technique. It is being evaluated in context of Art 59 QSO, 1984 as well. DNA report is conclusive proof in some cases⁴⁶. Admissibility of DNA report is two-fold i.e in cases pertaining to paternity and cases pertaining to sexual offences. Art 128, QSO, 1984 prohibits DNA test for matter of paternity⁴⁷. DNA test report is considered as corroborative piece of evidence⁴⁸ but the court has power to order the DNA test in order to check the credibility of allegations but with the consent of parties but not as a matter of routine⁴⁹. The credibility of DNA test report is questioned mainly on the ground of human error⁵⁰ but in recent Zainab Ansari's Case⁵¹ trial court exclusively relied upon the DNA test report and awarded the accused the capital punishment.

1.5. Recommendations:

Modern judicial systems widely accept the information gathered through modern devices and techniques, the use of technology and application of computer programming has attained a primary position in those systems but in perspective of Pakistan evidence produced through such modern

⁴⁵ 2018 YLR 2363

⁴⁶ PLD 2010 FSC 215

⁴⁷ PLD 2015 SC 327

⁴⁸ 2016 SCMR 274

⁴⁹ 2013 SCMR 203

⁵⁰ PLD 2010 Lah 422

⁵¹ A case of Sexual Abuse of 7 years old minor girl in District Kasoor.

resources is admissible in courts of law to some extent but not as a whole. The invitation agencies shall have to adopt the forensic and scientific modes of the evidence collection and the courts in Pakistan shall have to rely upon the evidence collected by the agencies through modern and forensic techniques.

At this point of time there is a reluctance by Pakistani to use even polygraph test when the modern world is ready to use FMRI (Functional magnetic resonance imaging) as a tool of investigation, FMRI scans individual's brain in order to detect changes in flow of blood that helps in criminal investigations.

The court in Pakistan are more conscious to take uproot the possible tempering with such modern evidence that is why there are as many as 21 standard of proving a scientific evidence i.e audio/video evidence so in order to make these techniques and devices applicable in our judicial system and to utilize the same the State should sanction establishment of special laboratories in order to forensically visit the evidence produced through aforementioned techniques and devices and for appropriate use of these as evidence.

1.6. Conclusion:

The statement or document which can be put into court to be relied upon for decision in the courts is termed as evidence and if this evidence is produced or obtained through use of computer or modern devices can be termed as scientific evidence.

Legal regime of Pakistan acknowledges the admissibility of scientific evidence especially in Art. 59 and 164 of the Qanoon-e-Shahdat Order, 1984. The apex courts of Pakistan also acknowledges the admissibility of scientific evidence the judgments and precedents of the exhibits the same.

The courts in Pakistan admits tape recorder, video and CCTV footages, audio recordings, photographs, CD, USB, GPS, RFID, Geo fencing etc., SMS, phone calls, CDRs, fax reports,

polygraph test and DNA profiling etc. as valid evidence.

However, Pakistani legal regime needs more improvements in the admissibility of scientific evidence as modern legal systems has more wide rules to admit the scientific evidence.

The points render in the recent judgment rendered by August Supreme Court of Pakistan in *Ishtiaq Ahmad Mirza* (opt cited) supra would defeat the true essence of the evidence and the standard of proof of a fact.

1.7. References:

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